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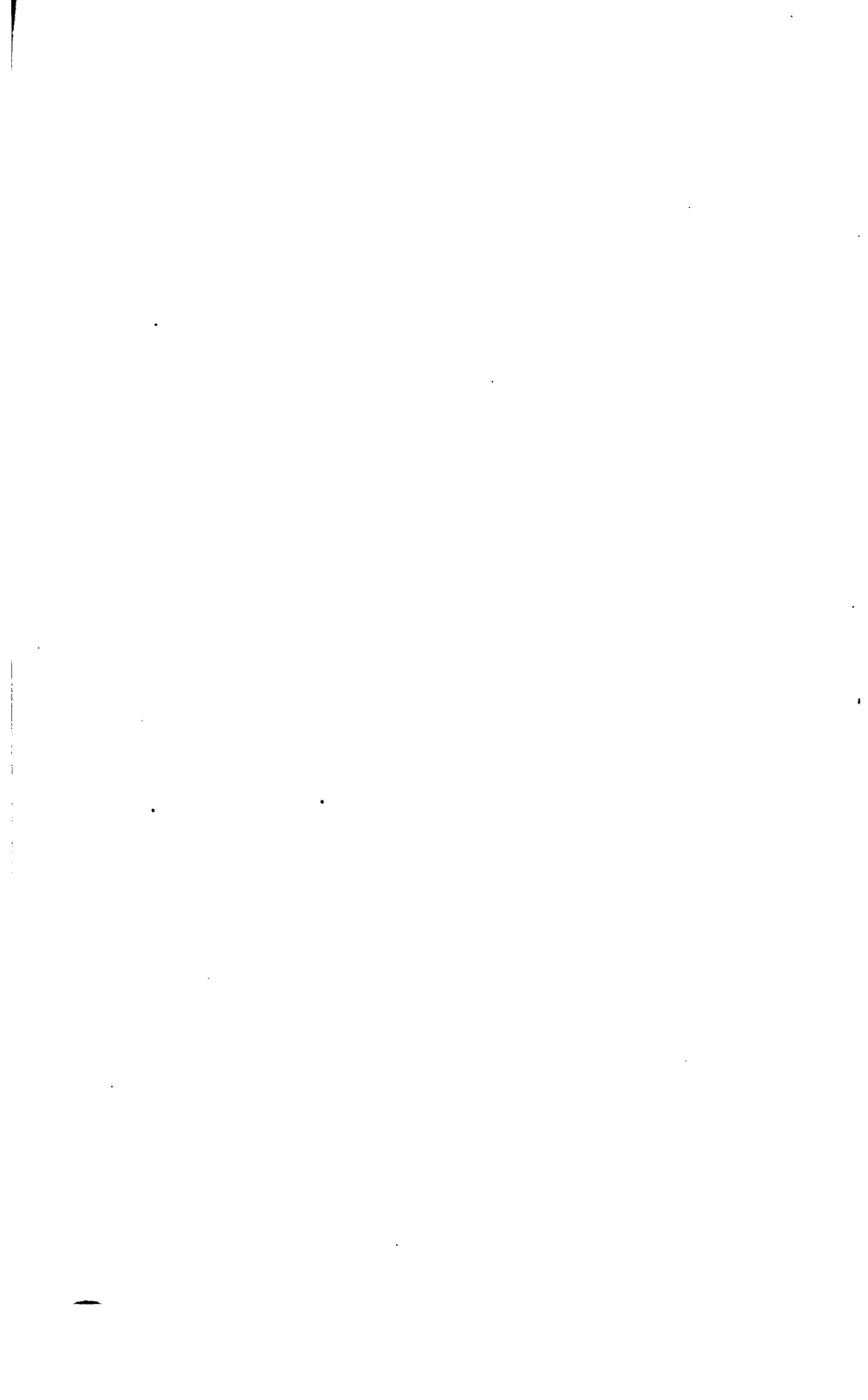
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REPORTS OF CASES

DECIDED IN THE

SUPREME COURT

OF THE

STATE OF OREGON

FRANK A. TURNER

REPORTER

VOLUME 98

FROM NOVEMBER 9, 1920, TO JANUARY 25, 1921.

SAN FRANCISCO

BANCROFT-WHITNEY COMPANY

1921

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IN THE STATE OF OREGON

January 25, 1921.

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Benton }
Douglas } JAMES W. HAMILTON, Roseburg.
Curry }
Coos } JOHN S. COKE, Marshfield.
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Umatilla } GILBERT W. PHELPS, Pendleton.

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Sherman		
Wheeler		

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Yamhill		

Thirteenth Judicial District—

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Clatsop	}	JAMES A. EAKIN, Astoria.
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DISTRICT ATTORNEYS

IN THE

STATE OF OREGON

January 25, 1921.

County.	Name.	Official Address.
Baker.....	Levens, W. S.	Baker
Benton.....	Clarke, Arthur	Corvallis
Clackamas.....	Stipp, L.	Oregon City
Clatsop.....	Erickson, J. O.	Astoria
Columbia.....	Foote, John L.	St. Helens
Coos.....	Fisher, Ben S.	Marshfield
Crook.....	Wirtz, Willard H.	Prineville
Curry.....	Stearns, Jr., J. O.	Gold Beach
Deschutes.....	Moore, Arthur J.	Bend
Douglas.....	Neuner, George, Jr.....	Roseburg
Gilliam.....	Weinke, T. A.....	Condon
Grant.....	Appling, R. M.	Prairie City
Harney.....	Sizmore, George S.....	Burns
Hood River.....	Baker, John	Hood River
Jackson.....	Moore, Rawles	Medford
Jefferson.....	Boylan, Bert C.	Madras
Josephine.....	Miller, W. T.	Grants Pass
Klamath.....	Brower, C. C.	Klamath Falls
Lake.....	McKinney, T. S.	Lakeview
Lane.....	Johnston, Clyde N.	Eugene
Lincoln.....	McCluskey, G. B.	Toledo
Linn.....	Lewelling, L. G.	Albany
Malheur.....	Lytle, Robert D.	Ontario
Marion.....	Carson, John H.	Salem
Morrow.....	Notson, Samuel E.	Heppner
Multnomah.....	Evans, Walter H.	Portland
Polk.....	Helgerson, J. N.	Dallas
Sherman.....	Huddleston, C. M.	Wasco
Tillamook.....	Goyne, T. H.	Tillamook
Umatilla.....	Keator, B. L.	Pendleton
Union.....	Wright, Ed	La Grande
Wallowa.....	Burleigh, W. S.	Enterprise
Wasco.....	Galloway, Francis V.	The Dalles
Washington.....	Tongue, E. B.	Hillsboro
Wheeler.....	Trill, Wallace G.	Fossil
Yamhill.....	Conner, Roswell L.	McMinnville

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CASES DECIDED
IN THE
SUPREME COURT
OF
OREGON.

Argued June 30, reversed and remanded November 9, 1920.

HAMMOND v. OREGON & CALIFORNIA R. CO.

(193 Pac. 457.)

Public Lands—Railroad Liable for Price Per Acre Paid to United States to "Confirm" Title.

1. In view of the Innocent Purchasers' Act (Act Cong. Aug. 20, 1912), plaintiffs, who, in good faith purchased land from a railroad company in violation of the grant of the land to the road from the United States, providing it should be sold only to actual settlers, in quantities of not more than quarter-sections, for not more than \$2.50 an acre, held entitled to recover from the railroad whose title was defeated by the United States the amount of \$2.50 an acre paid by them to the United States to perfect or "confirm" their title, which means to make firm or firmer, to establish or strengthen, to ratify, etc.

From Multnomah:

JOHN P. KAVANAUGH,

GEORGE W. STAPLETON and

ROBERT TUCKER,

} Judges Sitting in Banc.

This is an appeal from a judgment of the Circuit Court sustaining the general demurrer of the defendant to plaintiffs' complaint and dismissing the action. By the complaint a cause of action is set out upon the ground that the defendant agreed to sell and convey to the plaintiffs 45,972.43 acres of land for which the plaintiffs agreed to pay, and did

pay, as the purchase price the sum of \$321,807.01; and the defendant, because of an adverse claim of the United States, was unable to convey the lands as it had agreed, and the plaintiffs were required to pay to the United States the sum of \$2.50 per acre, or a total sum of \$114,932.50, in order to secure a confirmation of their titles. This confirmation was secured under remedial legislation of Congress enacted for the purpose, pursuant to which patents for the lands were issued to plaintiffs on the ground that they were purchasers in good faith from the railroad company.

The present case of Hammond and Winton is different from the case of *Booth-Kelly Lumber Co. v. Oregon & California Ry. Co.*, *post*, p. 21 (193 Pac. 463). In the case at bar the plaintiffs do not seek to recover from the railroad company the full purchase price paid for the land, but the sum of \$2.50 per acre, which they were required to pay the United States to perfect their titles to the land.

The complaint alleges, in substance, the following: About August 16, 1901, the plaintiffs, Hammond and Winton, entered into a written contract with the railroad company, which is set out at length in the complaint, by the terms of which the railroad company agreed to sell and convey, and the plaintiffs agreed to purchase at a price of \$7 per acre, some 45,000 acres of land, the exact acreage and the exact description to be agreed upon later between the parties. By the terms of the contract, one tenth of the purchase price was payable, and was paid at the time of the execution of the contract, and the balance of the principal, with interest at the rate of 6 per cent per annum, was payable in nine equal annual installments. The lands so agreed to be sold were

selected and identified by a supplementary agreement dated July 26, 1902, and the acreage and purchase price were fixed in the amounts above stated. The plaintiffs duly made full payment of the succeeding installments of the purchase price, together with interest thereon, all according to the contract terms, and made payment of the final installment on August 16, 1910. Upon such final payment the defendant became bound to convey the lands to the plaintiff, but the defendant has neglected, failed, and refused to convey the same, or any part thereof. The complaint then sets out the legislation of Congress making the land grants to aid in the construction of the Oregon and California Railroad. Reference is first made to the act of July 25, 1866 (14 Stat. 239) granting lands in aid of the so-called "East Side Line," and the provision of the act of April 10, 1869 (16 Stat. 47), which extended the time for construction under the act of July 25, 1866, and which contains the following provision:

"That the lands granted by the act aforesaid [meaning the said act of Congress approved July 25, 1866] shall be sold to actual settlers only, in quantities not greater than one-quarter section to one purchaser, and for a price not exceeding two dollars and fifty cents per acre."

The complaint then refers to the act of Congress of May 4, 1870 (16 Stat. 94), which made the grant for the so-called "West Side Line," and which contains a provision relative to the sale of lands similar to that contained in the act of April 10, 1869 (16 Stat. 47).

The allegations are continued thus: The defendant became the beneficiary of these two grants, and all of the lands which were the subject of the contract

of sale to plaintiffs, except one tract of 160 acres, fell within the grant of May 4, 1870. That tract fell within the grant of July 25, 1866, and pursuant to the terms of these grants all of the lands in question were patented by the United States to the defendant. Long before the making of the contract between the parties the defendant had made large numbers of sales of lands granted by the acts of July 25, 1866, and May 4, 1870, to persons who were not actual settlers, in quantities greater than one-quarter section to one purchaser and for prices exceeding \$2.50 per acre, and thereafter, and on April 30, 1908, Congress adopted a joint resolution (35 Stat. 571), authorizing the Attorney General to institute suits for the purpose of enforcing a forfeiture in favor of the United States with respect to the lands included in the two grants. On January 23, 1909, in pursuance of the joint resolution of April 30, 1908, the United States commenced a suit in the Circuit Court for the District of Oregon against Messrs. Hammond and Winton and the Oregon and California Railroad Company to enforce a forfeiture of the lands thus sold to the plaintiffs. Before the commencement by the United States of the suit last mentioned it had commenced another suit against the railroad company to recover a large quantity of lands, exceeding 2,000,000 acres, granted by the acts of 1866 and 1870, and remaining unsold, known as suit number 3340, which reference is here given for the reason that this suit is thus designated in the act of Congress of August 20, 1912, later referred to.

Suits similar to the one against Hammond and Winton were commenced about the same time against other persons who had purchased lands from the railroad company.

The complaint then sets out the provisions of the act of Congress approved August 20, 1912 (37 Stat. 320, Chap. 311), which authorized the Attorney General to enter into a compromise with any purchaser of the granted lands against whom suit had been brought under the joint resolution of April 30, 1908, and it was provided that such compromise should require the entry of a decree of forfeiture against such purchaser, and that within six months of the entry of such decree the purchaser should be entitled, on payment of the sum of \$2.50 per acre to the United States, to receive a patent for the lands covered by such decree. It is further alleged: On August 16, 1910, when the plaintiffs made final payment to the railroad company of the purchase price under the contract of August 16, 1901, the title to the lands so purchased was unmerchantable and unmarketable because of the provisions of the acts of 1866 and 1870, and because of the pendency of the suits of the United States above mentioned, and it was necessary for the plaintiffs, in order to confirm their title to the lands so purchased from the railroad company, to apply to the Attorney General for a compromise under the act of August 20, 1912, to pay to the United States the sum of \$2.50 per acre, and to receive from the United States its patent for the lands. About March 3, 1913, the plaintiffs applied to the Attorney General for such compromise and in accordance with the rules and regulations adopted by the Attorney General under the act of August 20, 1912, the plaintiffs, Hammond and Winton, were required to show that they purchased the lands in good faith, and without knowledge of the provisions of the granting acts prescribing the conditions of the sale of the lands, and the plaintiffs, by due proof, satisfied the Attorney General, as the

fact was, that they purchased the lands in good faith, and without any knowledge whatsoever as to the conditions relating to the sale of the lands, and, further, that all of the lands had been patented to the railroad company at the time of the purchase, and that none of the patents conveying the lands prescribed any limitations on the sale thereof. The Attorney General held and determined that these plaintiffs were purchasers of the lands in good faith, and he entered into a stipulation with these plaintiffs for the entry of a decree in the District Court of the United States for the District of Oregon in the suit there pending for the entry of a decree forfeiting the title of the lands to the United States, and providing that the plaintiffs should be entitled, upon payment of \$2.50 per acre, to receive a patent for the lands from the United States under the act of August 20, 1912. Upon the entry of such decree the plaintiffs paid to the United States the sum of \$2.50 per acre on account of the 45,972.43 acres purchased by them from the railroad company, making the amount of \$114,932.50, and there was thereupon issued to them, under the act of August 20, 1912, the patent of the United States. This was not a voluntary payment, but the plaintiffs were compelled to make the payment to avoid being ousted from the lands, and in order to acquire a valid title to the lands, and the payment was made solely because of the failure and neglect of the defendant to convey to the plaintiffs a valid title in accordance with the agreement of August 16, 1901. The complaint concludes with a prayer for judgment in the sum plaintiffs have been damaged, namely, \$114,932.50, with interest at the rate of 6 per cent from April 26, 1913.

To this complaint the defendant interposed a general demurrer, which was sustained, and upon this order judgment of dismissal was entered. By the act of Congress, of August 20, 1912, it was provided that all claims of forfeiture asserted by the Attorney General in suits brought by him under the authority of the Fulton resolution, of April 30, 1908, were declared to be of the same force and effect as declarations of forfeiture by Congress. It was provided that no suit should be instituted by the United States pursuant to the Fulton resolution of 1908, involving any land sold by the Oregon and California Railroad Company, prior to the date of that resolution, unless within one year from August 20, 1912, the date of the approval of the act. The purpose of this provision was to affirm the exclusion from suits against purchasers those who had purchased contrary to the terms of the provisos in quantities less than 1,000 acres. Compromises were made by the United States Attorney General with all other purchasers who were defendants in suits brought under the Fulton resolution.

In the statement in *Booth-Kelly Lumber Co. v. Oregon & California Ry. Co.*, *post*, p. 21, reference was made to the acts of Congress concerning this land grant, and the judicial decisions in regard to the matter, which need not be repeated here.

REVERSED AND REMANDED.

For appellants there was a brief over the names of *Messrs. Carey & Kerr* and *Mr. C. A. Hart*, with oral arguments by *Mr. James B. Kerr* and *Mr. Hart*.

For respondents there was a brief over the names of *Mr. Ben C. Dey* and *Mr. Alfred A. Hampson*, with an oral argument by *Mr. Hampson*.

Mr. S. W. Williams, Special Assistant to U. S. Attorney General, *Amicus Curiae*, on brief in behalf of United States.

Mr. George M. Brown, Attorney General, and *Mr. J. O. Bailey*, Assistant Attorney General, as *Amici Curiae*, on brief in behalf of State of Oregon.

BEAN, J.—1. In view of the fact that this controversy centers largely upon the setting of the case, we will make a concrete restatement. Plaintiffs entered into a written contract with the defendant for the purchase of 45,972.43 acres of land at the stipulated price of \$7 per acre, aggregating \$321,807.01. The plaintiffs completed their payments in accordance with the contract, and obtained all the right and title to the land that the defendant had. Long after the contract was made it was found that the United States government had an adverse claim to the lands, and by reason thereof the defendant was unable to give to plaintiffs a marketable title to the land. In order to obtain the interest of the United States to the lands and perfect and confirm their title plaintiffs were compelled to, and did, pay the United States the sum of \$2.50 per acre, aggregating \$114,932.50. This action is brought to recover from defendant the amount so paid to the United States. There is no claim or suggestion but that the payment by the plaintiffs to the United States was reasonable and fair and for the benefit of the defendant. In regard to the right of a covenantee, where he has purchased the outstanding title, to recover for the breach of the vendor's covenant, see 15 C. J., page 1324, Section 228.

It is the position of the defendant that the contract for the purchase of the land is illegal and contrary to public policy; that as the defendant was prohibited from selling the land in greater quantities than 160 acres and to actual settlers only, at a price not exceeding \$2.50 per acre, the plaintiffs were prohibited from making the purchase and were *in pari delicto* with the defendants. In other words, the defendant contends that the plaintiffs were not innocent purchasers in making the contract, but were equally guilty with the defendant in an infraction of the law. This question has been determined in the various decisions of the United States courts, and we are to a large extent relieved from the necessity of passing upon the innocence of plaintiffs in the transaction. We concur in the conclusion of the government as evidenced by the decisions of the Federal courts in the action of Congress, and the Department of Justice as represented by the Honorable United States Attorney General to the effect that the plaintiff was an innocent purchaser of the land, and was not *in pari delicto* with the railroad company. Plaintiffs were not violators of the law. No law restrained them from making a contract of purchase of the lands. That inhibition, or covenant of the grant, was directed to and made to control the defendant, not the plaintiffs. In the final adjustment between the United States and the plaintiff the sale of the land made by the railroad company to the plaintiffs was confirmed. No one suggests that the price stipulated for by the contract was inadequate or unfair. Therefore, as between the plaintiffs and defendant, if the sale is to stand, what reason can be thought of for changing the price fixed by the contract and paid by the plaintiff? Either the sale should be taken as it was made

or it should be ignored, and nothing done by the court in regard thereto, or it should be annulled.

All of the proceedings on the part of the government of the United States plainly portray that the thought enunciated by the Supreme Court of the United States and carried out was in effect that many years after the railroad grant was made a large number of acres of the land had been sold by the railroad company to innocent purchasers in greater quantities than permitted by the granting act, and it was determined that the lands were better suited for commercial purposes, or lumbering, than for homes. The railroad had been constructed and added to a transcontinental system, and the main object of the government in making the grant had been obtained. The railroad company had received, however, more for some of the land sold than the amount to which it was entitled. In order to adjust the matter to known present conditions, a plan was evolved to let the lands thus sold to innocent purchasers go to them as sold by the railroad company, but the railroad company, the grantee of the United States, should receive no more than provided for by the granting act, namely \$2.50 per acre.

We are now dealing with substance and not form. No new sale was made by the United States to plaintiffs at \$2.50 per acre. By the payment of that sum per acre by plaintiffs to the United States, a legal consideration for the conveyance was furnished, and the government was assured of receiving that much additional for the lands. All of the remainder in excess of \$2.50 per acre was to be recovered by the United States upon an accounting by the railroad company. The amount to be received was all problematical. A decree for the payment of a fixed amount

might never be satisfied. It does not seem to have been contemplated by the parties interested in the compromise that the sales to innocent purchasers should be held for naught or canceled or in any way left out of the adjustment. Congress in authorizing the adjustment did not evince any such intention. As stated by Judge WOLVERTON upon a remand of these cases from the federal court (opinion not reported):

"The Railroad Company acquired patents for the land from the Government, but had contracted to convey in violation of a provision of the grant requiring sales to be made to actual settlers only, in quantities not exceeding one-quarter section to one person, and at prices not exceeding \$2.50 per acre.

"It has been determined by the Supreme Court of the United States that this provision, which is contained in each of the two grants under which the patents were issued, is an enforceable covenant, which the Railroad Company was bound to perform. By reason of this provision, the Railroad Company was unable to convey to the plaintiffs satisfactory title to the lands, *as they had engaged to do* under their contract.

"Facing the predicament of losing their title, plaintiffs took advantage of the act of August 20, 1912, and by a compliance therewith title was confirmed in them by the Government on condition of their paying to the Government \$2.50 per acre as required by the act.

"Plaintiffs paid to the defendant \$7 per acre for the lands, and this action is to recover from the defendant the sum of \$2.50 per acre, which they were required to pay in order to acquire a good and marketable title. * *

"It is plain that plaintiffs' title thus confirmed is in no way in dispute. The only question that can arise is whether the plaintiffs, having sought confirmation under the act, thereby waived or abandoned any and all claims they might theretofore have had

against the Railroad Company on account of the failure to convey a marketable title. This is a question not dependent upon any construction of the act; nor, as it respects the demand for reparation, upon any right, title, or immunity given or granted by it. It merely depends upon the question whether, granting a compliance with the act, plaintiffs have abandoned or waived any right to relief they may previously have had against the Railroad Company on account of its failure or inability to convey a marketable title, as it had covenanted to do."

The words of Judge WOLVERTON which we have emphasized, used after and in the light of the adjudication by the United States Supreme Court in the main case, would seem strange indeed if applied to a void contract which would "engage" nothing. As stated at the outset, and also by Judge WOLVERTON, the title of the plaintiffs obtained by their contract was confirmed in them by the government. To confirm means "to make firm or firmer, to establish, to strengthen," and "to ratify": Webster's International Dictionary. When a sale upon execution is confirmed by the court, neither the sale nor the proceedings whereby it was obtained are held void, but are ratified and established. This case of Hammond and Winton is not much unlike that of *United States v. Winona & St. Peter Ry. Co.*, 165 U. S. 463 (41 L. Ed. 789, 17 Sup. Ct. Rep. 368, see, also, Rose's U. S. Notes). This was a suit brought to annul a certification of lands (a certificate having the same effect as a patent) for the benefit of the railroad company under a congressional land grant. Various purchasers from the railroad company were parties to the suit. By an act of Congress of March 2, 1896 (U. S. Comp. Stats., § 4901; 8 Fed. Stats. Ann. (2 ed.), p. 751), it was provided:

"But no patent to any lands held by a *bona fide* purchaser shall be vacated or annulled, but the right and title of such purchaser is hereby confirmed."

It appeared that at the time the lands were certified by the Land Department, as well as at the date of the definite location of the road, which was the date which determined the status of the lands as falling in or excluded from the grant, the lands were subject to homestead entries and pre-emption filings. It was alleged and proved that the defendant purchasers bought from the railroad company without actual knowledge of these old entries and filings, but the government contended that the purchasers were charged with the constructive notice of the record in the local land office, and could not qualify as *bona fide* purchasers, and were therefore not entitled to the protection of the confirmatory act of 1896. The court rejected this contention and said:

"It is earnestly contended by the government: That the present holders of the title are not '*bona fide* purchasers.' That that term has a fixed and well-defined meaning, as announced in the frequent decisions of this and other courts. That, as said in 2 Pom. Eq. Jur., § 745: 'The essential elements which constitute a *bona fide* purchaser are therefore three—a valuable consideration, the absence of notice, and presence of good faith.' *United States v. California etc. Land Co.*, 148 U. S. 31, 42 (37 L. Ed. 354, 13 Sup. Ct. Rep. 458, see, also, Rose's U. S. Notes). That while two of these essential elements may be found, to wit, a valuable consideration and the presence of good faith, the third, the absence of notice, is lacking. That all men are conclusively presumed to know the law, and that, as the true rule of construction in reference to these grants was laid down by this court, the purchasers were bound to know such true rule. That the records of the land office disclosed the existence of these homestead entries and pre-emption

filings, and therefore they who purchased from the railroad company knew, or at least were chargeable with knowledge, of the fact that those lands could not rightfully have been certified to the railroad company, but were excepted from the terms of grant, and in fact remained the property of the government. It is further insisted that, as Congress in this statute used this well-understood expression, it intended only the protection of such parties, as came within the scope of this settled meaning. It is said that the only cases to be covered by this provision were those in which the state or the railroad company by presentation to the land office, before the filing of the map of definite location, of a forged relinquishment by the pre-emptor, or one having made a homestead entry, or by some other fraudulent representations, secured a certification or patent to the tracts, and thereafter sold and conveyed to one who purchased in ignorance of the fraud.

“We are unable to agree with this contention of counsel, for several reasons: In the first place, the situation as it was known to exist makes against any such narrow construction. While instances of such fraudulent conduct on the part of the state to which the lands were certified, or the company to which the lands were patented, might exist, yet in the nature of things they would be few, and hardly worth the special notice of Congress, while, on the other hand, the fact that there had been a difference between the land department and the courts, one construction obtaining in the former prior to the decisions by the latter, and the further fact that by this difference of construction many tracts had been erroneously certified or patented, must have been well known to Congress, and naturally therefore a subject for its legislation.”

See, also, the case of *United States v. Detroit Timber & Lumber Co.*, 200 U. S. 321 (50 L. Ed. 499, 26 Sup. Ct. Rep. 282, see, also, Rose's U. S. Notes). The rule in regard to illegal contracts is plainly stated

in the opinion in *McMullen v. Hoffman*, 174 U. S. 639, at page 654 (43 L. Ed. 1117, 19 Sup. Ct. Rep. 839, 845), as follows:

"The authorities from the earliest time to the present unanimously hold that no court will lend its assistance in any way towards carrying out the terms of an illegal contract. In case any action is brought in which it is necessary to prove the illegal contract in order to maintain the action, courts will not enforce it, nor will they enforce any alleged rights directly springing from such contract. In cases of this kind the maxim is *Potior est conditio defendentis*."

See *Horseman v. Horseman*, 43 Or. 83 (72 Pac. 698); *Jackson v. Baker*, 48 Or. 155 (85 Pac. 512); *Kremer v. Earl*, 91 Cal. 112 (27 Pac. 735); 6 R. C. L., p. 816, § 215. Let us take the language used in *McMullen v. Hoffman*, and see if it has been applied by the court that rendered that opinion or acted upon by the Congress of the United States in enacting the law which has been sustained by the federal Supreme Court. Did that court refuse to lend its assistance towards carrying out the terms of the contracts with Hammond and Winton and the Booth-Kelly Lumber Company? No. On the other hand, the government of the United States, through the instrumentality of its courts and Congress, said to these vendees, in effect, keep the land which you have innocently purchased, but the United States still has an interest therein which will be obliterated, and your title will be confirmed upon the payment of \$2.50 per acre to the United States, under certain conditions, which were complied with by plaintiffs. This was very far from refusing to lend its aid in carrying out the terms of the sale or treating the contract of sale as a nullity. By means of such contract the vendee has, with the solemn sanction of the Congress and the courts of the United States,

obtained exactly what they contracted to purchase from the railroad company, at the further cost of \$2.50 for what is analogous to an outstanding title.

The plan evolved by the Supreme Court of the United States is entirely at variance with the contention of the defendant, that the contract on the part of plaintiffs was a swindle, wicked, and illegal. The Congress and the court of the United States have not given it such a status in respect to the plaintiffs. The act authorizing the confirmation of plaintiffs' title, having had the approval of the court, has the effect of construing and applying the original granting acts, and, as it was intended, is an adjustment and adjudication of the rights of plaintiffs under their contract of purchase. It is only for this court to consider it thus. It will be remembered that in the litigation between the United States and the Oregon and California Railroad Company the government took the position that the provisos relating to the sale of the granted lands to actual settlers constituted conditions subsequent annexed to the grants, and that the sales made contrary to these provisos operated to defeat the grants, and justified the United States in declaring a forfeiture and resuming title to all the lands, both to those which had been sold and those which were unsold. In the suit involving the unsold lands, this contention was sustained by Judge WOLVERTON: *United States v. Oregon & California R. Co.* (C. C.), 186 Fed. 861. The Supreme Court of the United States came to a radically different conclusion: *Oregon & California R. Co. v. United States*, 238 U. S. 393 (59 L. Ed. 1360, 35 Sup. Ct. Rep. 908, see, also, Rose's U. S. Notes). That court held that every intendment in the construction of the grants was against the claim of forfeiture,

and concluded that the provisos are not conditions subsequent, but covenants. The court notes the fact that no penalty is expressly prescribed for a breach of the covenants contained in the provisos. The court says:

“Our conclusions, then, on the contentions of the government and the railroad company, are that the provisos are not conditions subsequent; that they are covenants, and enforceable. * * ”

The court apparently held that there was no forfeiture by the railroad company of its unsold lands by reason of its sales, which were made in breach of the covenants contained in the provisos, and concluded as follows:

“This, then, being the situation resulting from conditions now existing, incident, it may be, to the prolonged disregard of the covenants by the railroad company, the lands invite now more to speculation than to settlement, and we think, therefore, that the railroad company should not only be enjoined from sales in violation of the covenants, but enjoined from any disposition of them whatever, or of the timber thereon, and from cutting or authorizing the cutting or removal of any of the timber thereon, until Congress shall have a reasonable opportunity to provide by legislation for their disposition in accordance with such policy as it may deem fitting under the circumstances, and at the same time secure to the defendants all the value the granting acts conferred upon the railroads.

“If Congress does not make such provision the defendants may apply to the District Court within a reasonable time, not less than six months, from the entry of the decree herein, for a modification of so much of the injunction herein ordered as enjoins any disposition of the lands and timber until Congress shall act, and the court in its discretion may modify the decree accordingly.”

If, as the court stated, it is impossible to believe that Congress contemplated a forfeiture by the railroad company of its unsold lands on account of a violation of the provisos, it is also impossible to believe that Congress contemplated that plaintiffs and other like purchasers from the railroad company should forfeit all moneys paid to the railroad company, and should take nothing by their contracts or deeds. Such a construction is not in harmony with the just dealings by the United States court and Congress with the defendant railroad company, whose violations of the provisos have been numerous and willful. The patents to the lands issued to the railroad, by the United States contained no reference to the provisos respecting alienation contained in the granting acts. These patents named as the grantee, not the original grantee, the Oregon Central Railroad Company, but a stranger to the legislation of Congress, namely, the Oregon and California Railroad Company. The language of Mr. Justice BREWER in *United States v. California & Oregon Land Co.*, 148 U. S. 31 (37 L. Ed. 354, 13 Sup. Ct. Rep. 458, see, also, Rose's U. S. Notes), in speaking of the diligence required of a purchaser of titles founded on a patent of the United States, is peculiarly apt. He says:

"If a patent from the government be presented, surely a purchaser from the patentee is not derelict, and does not fail in such diligence and care as are required to make him a *bona fide* purchaser, because he relies upon the determination made by the land officers of the government in executing the patent, and does not institute a personal inquiry into all the anterior transactions upon which the patent rested."

It is significant that in the act of 1912, granting to innocent purchasers the right of perfecting their titles by the payment to the government of the sum of \$2.50 per

acre, the patent provided for to be issued by the Secretary of the Interior, was merely to convey "all of the right, title and interest of the United States" in the land. The act of August 20, 1912, known as the "Innocent Purchasers' Act," which authorized the compromise, provided that a purchase under the provisions of the act "shall operate as a compromise of any and all claims of the United States for waste or trespass upon any of said lands committed by such purchaser, defendant or defendants, or their successors or assigns respectively." There was no attempt made to settle or compromise any question between the plaintiffs and the railroad company.

The plaintiffs, as they allege, being ignorant of the existence of any covenant affecting the disposition of these lands, in good faith and wholly innocent of any wrong, relying on such patents, contracted with the railroad company for the purchase of the lands. The defendant railroad company invokes the fiction that the plaintiffs were charged with the knowledge of the provisos contained in the acts of 1866 and 1870, and that therefore the contract of sale was unlawful and against public policy. We quote the language of Judge GILBERT in *Oregon R. & Nav. Co. v. Dumas*, 181 Fed. 781, 786 (104 C. C. A. 641, 646):

"A court should declare a contract void as against public policy only when the case is clear and free from doubt, and the injury to the public is substantial, and not theoretical or problematical."

The acts of Congress indicate the public policy in the disposition of the lands, and it is to them as interpreted by the federal courts that we must look to determine that question.

In many instances of illegal contracts or transactions the parties are not deemed to be in equal fault,

as there are degrees of wrong. A distinction has been taken between illegal contracts, both parties to which are equally culpable, and those in which, although both have participated in the illegal act, the guilt rests chiefly upon one. The maxim, "*Ex dolo malo non oritur actio*," is qualified by another, namely, "*In pari delicto melior est conditio defendentis*." Therefore, unless the parties are *in pari delicto* as well as *participes criminis*, the courts, although the contract is illegal, will afford relief where equity requires it, to the more innocent party, even after the contract has been executed. Such cases form an independent class, entirely distinct from those cases which rest upon a disaffirmance of the contract before it is executed. But as in the case of the repudiation of an executory illegal contract the recovery is had, not under, but independently of, the contract which is treated as a nullity. The first cases in which the principle was applied were naturally those where the statute violated by the contract was intended for the special protection of the party seeking relief from some undue advantage taken by the other. But it soon came to be seen that the principle was equally applicable to cases where the law infringed was intended for the protection of the public in general: See 6 R. C. L., p. 833, § 223. If it be considered that the plaintiffs had constructive notice of the provisos contained in the granting acts referred to, then it would seem that the federal court and Congress deemed the plaintiffs to be not *in pari delicto* with the defendant, and therefore entitled to relief.

Much is said in both of these cases in support of the position of the defendants, in criticising the acts of plaintiffs in completing the payments after suit was brought by the United States. The plaintiffs

could do but one of two things; either make a small payment to complete the purchase, or subject themselves to the contention by defendant that they had not complied with their contract and were entitled to nothing. The matter was then wholly at sea, and any novice in legal matters would advise plaintiffs to take the course they did.

The demurrer to the complaint should be overruled.

The judgment of the lower court is therefore reversed, and the cause remanded for such further proceedings as may be deemed necessary, not inconsistent herewith.

REVERSED AND REMANDED.

McBRIDE, C. J., and BENSON, HARRIS and JOHNS, JJ., concur.

BURNETT, J., concurs in the result.

Mr. Justice BENNETT, who heard the case, having resigned, did not participate in the decision.

Argued June 29, reversed November 9, 1920.

BOOTH-KELLY LUMBER CO. v. OREGON & CALIFORNIA R. CO.

(193 Pac. 463.)

Public Lands—Railroad Liable for Price Per Acre Paid to United States to Perfect Title—"Void."

1. In view of the Chamberlain-Ferris Act of June 9, 1916, a lumber company, which in good faith purchased some 19,000 acres of land from a railroad company, in violation of the grant of the land to the road from the United States, providing that it should be sold only to actual settlers in quantities not greater than quarter-sections, and for not more than \$2.50 an acre, *held* entitled to recover from the railroad, whose title was defeated by the United States, the amount of \$2.50 an acre paid by it to the United States to perfect its title, but not the total illegal price paid by it to the road, the contract between it and the road not having been "void"; that is, a mere nullity.

For the meaning of the word "void," see note in 5 A. L. R. 1518.

From Multnomah:

JOHN P. KAVANAUGH,
GEORGE W. STAPLETON and } Judges Sitting in Banc.
ROBERT TUCKER,

This is an action to recover money paid by plaintiff to defendant for land which by statute defendant was prohibited from selling. A demurrer to the complaint was sustained, and, the plaintiff declining to amend or plead further, judgment that plaintiff take nothing by its action was entered. Plaintiff appeals. Error is assigned in sustaining the demurrer and entering the judgment.

The complaint contains substantially the following allegations: By two instruments in writing, dated December 21, 1901, and January 2, 1903, respectively, the defendant agreed to sell and convey, and the plaintiff's assignor agreed to purchase, 19,283.71 acres of land at \$10 per acre, the defendant agreeing that when the purchase money was paid, it would "cause to be made and executed * * a deed, assigning, transferring and setting over * * all the land" therein described. The purchase money was paid to the defendant, and all was done by the plaintiff and its assignors as agreed, but the defendant never performed its stipulations, and refuses to do so. The land described in the written instruments was a part of a grant of over two million acres by the United States to the defendant, by an act of Congress of July 25, 1866 (14 Stat. 239) as amended April 10, 1869 (16 Stat. 47). The act of Congress of April 10, 1869, required the defendant to sell the land "to actual settlers only, in quantities not greater than one-quarter section to one purchaser, and for a price not exceeding two dollars and fifty cents per acre."

Prior to the date of the transaction between the parties hereto, patents were issued by the United States to the defendant for the land described in the instruments mentioned and over two million acres besides. These patents contained nothing to indicate that any such statutory prohibition existed, and did not mention the act of 1869 in which it was contained. Beginning many years prior to the date of the written instruments, the defendant had made a large number of sales of land granted by the acts of Congress, to purchasers who were not actual settlers, in quantities much greater than one-quarter section to one purchaser, and for prices greatly exceeding \$2.50 per acre. This was a matter of general knowledge in the vicinity of these lands, where the title of the defendant to its granted lands was generally regarded as a perfect title in fee simple, without encumbrance or restriction, and customarily accepted as such, without question or examination. The plaintiff and its assignors knew and relied upon these facts, and had no knowledge of the statute prohibiting the defendant from making such a sale. The defendant knew of that statute, knew that the plaintiff and its assignors had no knowledge thereof, and knew that they relied upon the facts, knowledge, and custom above mentioned. The defendant represented to the plaintiff and its assignors that it was the owner of an unencumbered and unrestricted fee-simple estate in the lands described in the instruments. The plaintiff and its assignors relied thereon, and understood that such an estate in the land was to be conveyed to them. This and other like transactions of the defendant, violative of the requirements of the provisos of the granting act as to the sale of the land, came to the attention of the United States. By subsequent legis-

lation and judicial proceedings, the United States took from defendant, not only this land which defendant had undertaken to convey to plaintiff, but all the rest of the two million acres of land granted to it, and provided for the payment, by the United States to the defendant, of \$2.50 an acre for the entire land grant, including the land which was the subject of the present transaction. Such forfeiture of the grant has been upheld by the Supreme Court of the United States.

It is deemed essential that reference be made to the acts of Congress concerning this land grant and the judicial decisions interpreting the grant and determining the rights of the defendant. The land which defendant undertook to sell to plaintiff is part of over two million acres granted to defendant, known as the "East Side Grant." This granting act, as amended, provided:

"That the lands granted * * shall be sold to actual settlers only, in quantities not greater than one-quarter section to one purchaser, and for a price not exceeding two dollars and fifty cents per acre."

The "West Side Grant" of May 4, 1870, contained a like provision, both known as the "settler's clause." The defendant in its dealings with the lands granted to it by these acts had for a long time entirely disregarded these provisos. On May 28, 1908, pursuant to an act of Congress of April 30, 1908 (35 Stat. 571), authorizing and directing him to proceed to enforce any rights or remedies of the United States growing out of the above-mentioned acts of Congress, the Attorney General of the United States filed a bill in equity against the defendant and others, and in January, 1909, forty-five other bills in equity, the railroad company being a party defendant in each

of them. In each of these cases there was joined as an additional party defendant some individual or corporation to whom the defendant had attempted to sell some of the land in violation of the prohibition contained in the granting acts, the plaintiff being such an additional defendant in one of those suits. The suit of May 28, 1908, called for convenience the "main case," involved the title to granted land which the defendant had not in any way attempted to sell, and each of the forty-five later suits, known as the "Innocent Purchaser Cases," concerned only the land which the defendant had attempted to sell to such an additional party defendant. The United States in all these suits asserted that by reason of breaches by the defendant of the so-called "settler's clause" in the grants, the title had been forfeited to and reverted in the United States. This contention of the government was sustained by Judge WOLVERTON in a decision of April 24, 1911, in the main case (*United States v. Oregon & California R. Co. et al.* (C. C.), [186 Fed. 861]).

The act of Congress of August 20, 1912, authorized the Attorney General to enter into a compromise with any purchaser of the granted lands against whom suit had been brought under the joint resolution of April 30, 1908, and it was provided that such compromise should require the entry of a decree of forfeiture against such purchaser, and that within six months of the entry of such decree the purchaser should be entitled, on payment of the sum of \$2.50 per acre to the United States, to receive a patent for the lands covered by such decree. Pursuant to section 4 of this act, the Attorney General stipulated with the plaintiff, the additional party defendant in one of the forty-five suits above mentioned, and a

decree of forfeiture was entered in that case. The defendant, a party to that suit, was present and offered no objection to the entry of that decree. All this was done in February and March, 1913. Thereafter plaintiff made application to the Secretary of the Interior to purchase the lands forfeited, paid the Treasurer of the United States \$2.50 per acre for all the lands so applied for, and on July 21, 1913, the Secretary of the Interior caused a patent to be issued to plaintiff, conveying the land to it. The main case, involving the rights of the defendant in the entire grant, was decided by the Supreme Court of the United States on June 21, 1915 (*Oregon & California R. Co. v. United States*, 238 U. S. 393 [59 L. Ed. 1360, 35 Sup. Ct. Rep. 908, see, also, Rose's U. S. Notes]), about two years later. The Supreme Court held that the only interest the defendant ever had in this land was the right to receive not more than \$2.50 an acre for it by selling it to actual settlers only in tracts of a quarter-section or less; that under the terms of the grant, a law as well as a grant, it was unlawful for the defendant to sell in violation of its provisions; and that the United States might sell the lands, provided only it secured to the defendant all that the granting acts conferred upon it, namely, \$2.50 per acre. Thereafter Congress, acting on this suggestion, enacted what is known as the "Chamberlain-Ferris Act," of June 9, 1916 (39 Stat. 218), providing for the sale of the land by the United States and the payment from the proceeds to the defendant of an amount equal to \$2.50 an acre for the entire land grant. Section 7 of this act reads:

"That the Attorney-General of the United States be, and he is hereby authorized and directed to institute and prosecute any and all suits in equity and actions at law against the Oregon and California

Railroad Company, and any other proper party which he may deem appropriate, to have determined the amount of moneys which have been received by the said railroad company or its predecessors from or on account of any of said granted lands, whether sold or unsold, patented or unpatented, and which should be charged against it as a part of the 'full value' secured to the grantees under said granting Acts as heretofore interpreted by the Supreme Court. In making this determination the court shall take into consideration and give due and proper legal effect to all receipts of money from sales of land or timber, forfeited contracts, rent, timber depredations, and interest on contracts, or from any other source relating to said lands; also to the value of timber taken from said lands and used by said grantees or their successor or successors. In making this determination in the aforementioned suit or suits the court shall also determine, on the application of the Attorney General, the amount of the taxes on said lands paid by the United States, as provided in this Act, and which should in law have been paid by the said Oregon and California Railroad Company, and the amount thus determined shall be treated as money received by said railroad company."

The validity of this act of June 9, 1916, has been sustained by the Supreme Court in an opinion of April 23, 1917 (*Oregon & California R. Co. v. United States*, 243 U. S. 549 [61 L. Ed. 890, 37 Sup. Ct. Rep. 443]). By this act it was provided that all claims of forfeiture asserted by the Attorney General in suits brought by him under the authority of the Fulton resolution of April 30, 1908, were declared to be of the same force and effect as declarations of forfeiture by Congress. It was provided that no suit should be instituted by the United States pursuant to the Fulton resolution of 1908, involving any land sold by the Oregon and California Railroad Company

prior to the date of that resolution, unless within one year from August 20, 1912, the date of the approval of the act. The purpose of this provision was to affirm the exclusion from suits against purchasers those who had purchased, contrary to the terms of the provisos, in quantities less than 1,000 acres. Compromises were made by the United States Attorney General with all other purchasers who were defendants in suits brought under the Fulton resolution. As stated in the opinion, *Oregon & California R. Co. v. United States*, 238 U. S. 393 (59 L. Ed. 1360, 35 Sup. Ct. Rep. 908):

"During the year 1870 the Oregon & California Railroad Company procured, by mortgage bonds, approximately \$8,000,000, and during the year 1871 the West Side Company in the same way procured about \$1,000,000. With the funds thus procured the lines of railroad contemplated by the act of 1866 and the act of May 4, 1870, respectively, were prosecuted continuously until about January, 1873."

REVERSED.

For appellant there was a brief over the names of *Mr. Glenn E. Husted* and *Mr. Mark Norris*, with an oral argument by *Mr. Husted*.

For respondent there was a brief over the names of *Mr. Alfred A. Hampson* and *Mr. Ben C. Dey*, with an oral argument by *Mr. Hampson*.

Mr. S. W. Williams, Special Assistant to U. S. Attorney General, *Amicus Curiae*, on brief in behalf of United States.

Mr. George M. Brown, Attorney General, and *Mr. J. O. Bailey*, Assistant Attorney General, as *Amici Curiae*, on brief in behalf of State of Oregon.

BEAN, J.—1. Having rendered an opinion on this date in the case of *Hammond v. Oregon & California R. Co.*, ante, p. 1 (193 Pac. 457), involving questions similar to those in the present case, but one phase of the case remains to be considered. It is the position of plaintiff that what the defendant undertook to do by its contract was prohibited by statute and null and void; that the plaintiff received nothing from defendant for the money it paid to it upon the land contract; that the transaction was not *malum in se*, but merely *malum prohibitum*; and that plaintiff is entitled to recover all the money it paid to defendant in this action for money had and received. It is suggested by plaintiff that in any event the plaintiff is entitled to recover the lesser sum of \$2.50 per acre, the amount paid to the United States to perfect plaintiff's title.

There can be no question but that plaintiff, by its contract and payment, obtained all the right and title to the lands that the defendant had or could convey. What title did the defendant get by virtue of the grant and the construction of the road in compliance therewith? This question has been answered by the federal supreme court in *Oregon and California R. Co. v. United States*, 238 U. S. 393 (59 L. Ed. 1360, 35 Sup. Ct. Rep. 908). We quote from page 434 of 238 U. S., page 924 of 35 Sup. Ct. Rep. (59 L. Ed. 1360), the language used in construing the grants:

“There was a complete and absolute grant to the railroad company with power to sell, limited only as prescribed. * * ”

The lumber company, after ascertaining all of the facts, did not attempt to rescind, or treat the contract as a nullity, but held fast to whatever rights they had. It was the vendee of all the interest the rail-

road had in the land and could convey, and as such vendee it established its good faith in the transaction to the satisfaction of the Department of Justice of the United States. By virtue of being such vendee, or innocent purchaser, it obtained a confirmation of its title to the lands upon the payment of \$2.50 per acre to the United States. Being such purchaser from the railroad company formed the basis of its right to obtain a confirmatory title to the lands from the United States. This status was reached by means of its contract with, and payment to, the defendant. It is now contrary to plaintiff's former conduct for it to say that it received nothing by virtue of its contract, or the money paid defendant. It should not now be permitted to treat the foundation of its title as a nullity. As noted in the Hammond case, the title of plaintiff to the land was confirmed by the United States, and the contract in question ratified. The law applicable to the transaction and the policy of the government are both fixed by the federal acts and adjudication. In order to perfect its title to the lands plaintiff was compelled to, and did pay the sum of \$2.50 per acre. As already stated in the Hammond case, the contract of purchase should be carried out as made by the parties or disregarded. It is not the province of the court to make a new contract for the parties. The plaintiff should have title to the lands for the price fixed by the contract, and should recover the amount it was compelled to pay for the outstanding title. This amount is not claimed by defendant to be unreasonable or unfair.

It is suggested by the defendant that it may be required to account and pay to the United States the full amount of the contract price. As we understand the provision in regard to the accounting, it is to

be adjudged in a legal manner. In the language of the Chamberlain-Ferris Act of June 9, 1916, suits are authorized—

“to have determined the amount of moneys which have been received by the said railroad company or its predecessors from or on account of any of said granted lands, whether sold or unsold, patented or unpatented, and *which should be charged against it* as a part of the ‘full value’ secured to the grantees under said granting Acts as heretofore interpreted by the Supreme Court. In making this determination the court shall take into consideration and give due and proper legal effect to all receipts of money from sales of land or timber.* * ” Section 7.

We see no reason for the defendant to fear that anything will be charged against it in such an accounting which should not be charged.

Confusion has resulted from the lack of precision in the use of the terms “void” and “voidable” contracts. A contract which the law denounces as void is necessarily no contract whatever, and the acts of the parties in an effort to create one in no wise bring about a change of their legal status. The parties and the subject matter of the contract remain just as they did before any act was performed in relation thereto. A void contract is a mere nullity. It is obligatory on neither party. It requires no disaffirmance to avoid it, and cannot be validated by ratification. It is void as to everybody whose rights would be affected by it if valid: 6 R. C. L., p. 591, § 10; *Bradtfelt v. Cooke*, 27 Or. 194 (40 Pac. 1, 50 Am. St. Rep. 701); *Allen v. Berryhill*, 27 Iowa, 534 (1 Am. Rep. 309); *Blinn v. Schwartz*, 177 N. Y. 252 (69 N. E. 542, 101 Am. St. Rep. 806); *Tate v. Gaines*, 25 Okl. 141 (105 Pac. 193, 26 L. R. A. (N. S.) 106);

Jordan v. Greensboro Furnace Co., 126 N. C. 143 (35 S. E. 247, 78 Am. St. Rep. 644); *Kellogg v. Howes*, 81 Cal. 170 (22 Pac. 509, 6 L. R. A. 588, and note); *Austin v. Davis*, 128 Ind. 472 (26 N. E. 890, 25 Am. St. Rep. 456, 12 L. R. A. 120); *Breckenridge v. Ormsby*, 1 J. J. Marsh. (24 Ky.) 236 (19 Am. Dec. 71); *McFarland v. Heim*, 127 Mo. 327 (29 S. W. 1030, 48 Am. St. Rep. 629).

The land contract in question does not come within any of the descriptions of a void contract. It affected the rights of the parties and bore fruit. It is obligatory upon the defendant. The Booth-Kelly Lumber Company was not in equal fault with the Oregon and California Railroad Company in making the contract of sale in violation of the provisos of the grant, and is therefore entitled to recover the money paid to perfect its title. Upon this point, in addition to the other authorities cited in the Hammond and Winton case, see *Lowell v. Boston & Lowell R.*, 23 Pick. (Mass.) 24 (34 Am. Dec. 33, 37); *Tracy v. Talmage*, 14 N. Y. 162 (67 Am. Dec. 132, 143); *Schermerhorn v. Talman*, 14 N. Y. 93; *Bond v. Montgomery*, 56 Ark. 563, 571 (20 S. W. 525, 35 Am. St. Rep. 119); *Michener v. Watts*, 176 Ind. 376 (96 N. E. 127, 36 L. R. A. (N. S.) 142); *Manchester etc. R. Co. v. Concord R. Co.*, 66 N. H. 100 (20 Atl. 383, 49 Am. St. Rep. 582, 9 L. R. A. 689); *Quirk v. Thomas*, 6 Mich. 111.

The facts alleged in the complaint show that the plaintiff is entitled to recover the sum of \$2.50 per acre, paid to the United States to perfect its title to the lands purchased of defendant. Therefore the demurrer to the complaint should be overruled.

The judgment of the lower court is reversed, and the cause will be remanded for such further proceed-

ings as may be deemed proper, not inconsistent herewith.

REVERSED AND REMANDED.

Mr. Justice HARRIS did not sit in this case.

Mr. Justice BENNETT, who heard the case, having resigned, did not participate in the decision.

MCBRIDE, C. J., and JOHNS, J., concur.

BURNETT, J., Dissenting in Part and Concurring in Part.—The plaintiff sues to recover money which it and its grantors paid to the defendant on a contract by which the latter agreed to sell to the plaintiff certain lands granted to predecessors in interest of the defendant by the United States to aid in the construction of certain railroads in this state. The acts of Congress granting the lands are those of July 25, 1866, 14 Stat. at L. 239, April 10, 1869, 16 Stat. at L. 47, and May 4, 1870, 16 Stat. at L. 94. The plaintiff claims that its contract called for the conveyance of upwards of 19,000 acres of land, upon which it has paid to the defendant \$192,837.10; that the plaintiff has fully performed the contract on its part; and that the defendant refuses to perform any of its conditions on its part to be performed. In addition to the foregoing, constituting the substance of the complaint, that pleading goes on to state that the lands contracted for were part of those granted by the acts of Congress referred to; that patents had been issued by the general government to the defendant including all of the lands here in question; that for many years prior to the date of the contract the defendant had been selling to many people, not actual settlers, quantities of land much greater than quarter-sections, at prices greatly exceeding \$2.50 per acre; that this was a matter of general knowledge in the vicinity; and

that, until about April 30, 1908, the title of the defendant to the realty in question was generally regarded as a perfect title in fee simple, without encumbrance or restriction. The plaintiff avers that it and its predecessors in interest knew and relied upon these facts as constituting a custom prevalent in the community, and had no knowledge of the provisions of the acts of Congress referred to, to the effect that the defendant should sell the lands only to actual settlers thereon, at a price not exceeding \$2.50 per acre; but that the defendant well knew the terms of the statutes mentioned. The complaint recites also that the United States filed its bill in equity against the defendant and this plaintiff on January 23, 1909, in the United States District Court for the District of Oregon, averring, in substance, that the defendant had sold the realty in direct contravention of the act of Congress, limiting the sale in quantity and price as stated; that as a result of the litigation a decree was entered, forfeiting the land to the United States government; and that afterwards the plaintiff filed with the Secretary of the Interior a certified copy of the decree, together with its application to purchase all of the lands decreed in that suit to be forfeited to the United States, and paid to the treasury of the United States the sum of \$2.50 an acre, whereupon the United States government issued to the plaintiff a patent to all of the lands involved in the contract before mentioned. As a conclusion from all of these statements, in its complaint, the plaintiff demands judgment against the defendant for the amount of money paid as the purchase price. The Circuit Court sustained a demurrer to this complaint, and, the plaintiff having refused to plead further, a judgment was entered that it take nothing, and that the defend-

ant have judgment against it for its costs and disbursements, whereupon the plaintiff appealed.

The controversy hinges upon the effect of the proviso in the acts granting the land to the railroad company, whereby the grantee was required to sell the land to settlers only, and at a price not exceeding \$2.50 per acre, and the effect of subsequent Congressional legislation. This portion of the granting acts had the construction of the Supreme Court of the United States in the case of *Oregon & California R. Co. v. United States*, 238 U. S. 393 (59 L. Ed. 1360, 35 Sup. Ct. Rep. 908, see, also, Rose's U. S. Notes), and again in the same case in 243 U. S. 549 (61 L. Ed. 890, 37 Sup. Ct. Rep. 443). That suit was one brought by the United States against the defendant, known in the argument as the "main case," to declare a forfeiture to the United States of all of the lands which had not been sold by the company, aggregating 2,300,000 acres. The contention of the government was that the proviso of the acts limiting the amount of land to be sold to actual settlers and the price to be paid therefor was a condition subsequent, the violation of which had utterly forfeited the land to the government. In 238 U. S. 393, the court held in effect that the proviso was not a condition subsequent, but an enforceable covenant. The conclusion of the court is thus stated:

"There was a complete and absolute grant to the railroad company with power to sell, limited only as prescribed, and we agree with the government that the company 'might choose the actual settler; might sell for any price not exceeding \$2.50 an acre; might sell in quantities of 40, 60, or 100 acres, or any amount not exceeding 160 acres.' And we add, it might choose the time for selling or its use of the grants as a means of credit, subject ultimately to the

restrictions imposed; and we say 'restrictions imposed' to reject the contention of the railroad company that an implication of the power to mortgage the lands carried a right to sell on foreclosure divested of the obligations of the provisos."

The result of the litigation as given shape by the opinion of the court when the case was first before it was that, owing to the repeated and extensive violations of the provisos of the acts of Congress, a new situation had arisen calling for a decree of the court to the effect that the railroad company should not only be enjoined from sales in breach of the covenant, but also restrained from making any alienation of the lands whatever, or of the timber thereon, until Congress should have an opportunity to provide by legislation for their disposition as it might deem fitting under the circumstances, and at the same time secure to the defendants all the value the granting acts conferred upon the railroads. An alternative was also expressed that if Congress did not act upon the subject, the defendants might apply to the District Court within a reasonable time not less than six months from the entry of the decree, for a modification thereof, not material to be noted here.

In the act of July 25, 1866, Congress had retained the right to add to, alter, amend, or repeal the granting act at any time, having due regard for the rights of the grantee railroad company. Acting under that reservation, Congress passed the act of August 20, 1912, 37 U. S. Stat. 320, revesting the title to all of those lands in the United States government. After adopting the claims of forfeiture asserted by the Attorney General in or by suits in equity, actions at law or other judicial proceedings instituted pursuant to the joint resolution of Congress approved April

30, 1908, and giving them the same force and effect as declarations of forfeiture by acts of Congress, withdrawing the lands reverting to the government from entry under the public land laws, and placing certain restrictions on future suits looking to the forfeiture of any of the lands granted the railroad company; Section 4 of the act reads thus:

“That the attorney general is hereby authorized to compromise in the manner hereinafter provided any suit heretofore or hereafter instituted pursuant to the provision of said joint resolution approved April thirtieth, nineteen hundred and eight, involving lands purchased from the said Oregon and California Railroad Company prior to September fourth, nineteen hundred and eight. In any such suit the attorney general may, in his discretion, stipulate with the defendant or defendants who purchased said lands, or are the successors or assigns of such purchaser or purchasers, that decree shall be entered adjudging that the lands involved therein have been and are forfeited to the United States. Such decree shall recite that the same was entered pursuant to such stipulation. If said purchaser defendant or defendants, or their successors or assigns, shall within six months from the entry of said decree file with the secretary of the interior a certified copy of said decree, together with an application to purchase all of the lands adjudged by said decree to have been forfeited to the United States as aforesaid, and shall pay to the treasurer of the United States the sum of two dollars and fifty cents per acre for all of the lands so applied for, the secretary of the interior shall cause patents to be issued conveying to said purchaser defendant or defendants, and their successors and assigns, all of the right, title, and interest of the United States in and to all of said lands; and such purchase shall operate as a compromise of any and all claims of the United States for waste or trespass upon any of said lands committed by such purchaser defendant or defendants or their successors or as-

signs, respectively: *Provided*, That the benefits of this section shall not be exercised or enjoyed except in cases where decree shall have been entered pursuant to stipulation entered into as aforesaid: *And provided further*, That the provisions of this section shall not apply to any lands that have not been patented to said Oregon and California Railroad Company: *And provided further*, That the aforesaid privilege of purchasing said forfeited lands shall not be exercised or enjoyed as to less than all of the lands involved in said suits, respectively, the purpose hereof being to prevent the elimination from any purchase of any lands from which timber has been removed or upon which any other waste or trespass has been committed, or the elimination of any part whatever of any land from such purchase."

Section 5 makes the act inapplicable to what has heretofore been designated as the main suit. Section 6 reads as follows:

"That nothing in this act contained, nor action taken pursuant to the provisions of this act, shall be construed as a condonation of any of the breaches of any of the conditions or provisions annexed to any of the grants designated in said joint resolution approved April thirtieth, nineteen hundred and eight, nor as a waiver of any of said conditions or provisions, nor as a waiver of any right of forfeiture in favor of the United States on account of any breach or breaches of any of said conditions, nor as a waiver of any cause of action or remedy of the United States on account of any breach or breaches of any of said conditions or provisions, nor as a waiver of any other rights or remedies existing in favor of the United States."

Notwithstanding the voluminous briefs and extended arguments as between the parties to this suit, the matter in controversy is brought within a simple and narrow compass. The defendant contracted to sell the land to the plaintiff. The latter had per-

formed its part of the executory contract. While it was still in process of execution awaiting its completion by the conveyance of the fee-simple title to the land yet to be performed by the defendant, the government reassumed the title to the land. This was attributable to the defendant's breach of what the Supreme Court of the United States has decided to be its enforceable covenant. The law had not forbidden the plaintiff to buy the land. It has committed no wrong. It was not a party to the covenant. One party cannot violate another party's covenant. When it discovered that the defendant could not convey and had not conveyed anything, the plaintiff was entitled to recover the money it had paid, upon the simple principle that it had paid for something which it had not received.

It is said in argument that the plaintiff received the benefit of its contract with the defendant. This is fallacious. The general government had forfeited whatever title the defendant had in the land. Under the sixth section of the act referred to, the government reserved all remedies against the defendant. It has no right to any benefit under that act. Having given nothing, it cannot keep anything it received. It is said in the fourth section that the Attorney General is authorized to compromise pending suits "in the manner hereinafter provided." Later in the same section those in the situation of the plaintiff here were authorized to pay to the United States, after the title had been forfeited to the government, \$2.50 an acre, and buy, not from the defendant, but from the government direct, all of the lands mentioned; and the act expressly gives the extent of the compromise in these words:

"And such purchase shall operate as a compromise of any and all claims of the United States for waste or trespass upon any of said lands committed by such purchaser defendant or defendants or their successors or assigns, respectively."

The extent of the compromise is thus limited and defined. There was no compromise respecting the actual title of the land. It was taken away from the defendant as fully and decisively as could possibly be, and reverted to the government. By the first section of the act, the suit itself, already begun by the Attorney General, was declared equivalent to forfeiture by act of Congress. There was no reason for compromise as to the title, and none was contemplated by the statute. It is not a case where the purchaser gets a partial estate from the seller, which he is entitled to perfect by purchasing an outstanding title more or less paramount. Having received nothing from the defendant, there was nothing for the plaintiff to return to the seller. When the latter's title came to naught by reason of its breach of the covenants connected with its creation, at that moment the plaintiff was entitled to recover the money it had paid. The situation presented is equivalent to one in which the purchaser from A. has gone into possession and has been ejected by B. under paramount title. The purchaser has not bought his peace as to the title. He has been forced to surrender the title and has become a stranger to it. That he afterwards buys it from the true owner or effects a compromise for the trespass or damage done by him while in possession does not in any degree lessen the liability of A., his former grantee, to refund to him the full purchase price paid. If the plaintiff had procured the right to purchase the land from the gov-

ernment by any act or assistance of the defendant, there would be some ground for the argument that the plaintiff, having received the benefit of its contract, cannot now repudiate it and recover the money without placing the defendant *in statu quo*. But the record shows that the plaintiff secured the right to purchase, not on account of any act of the defendant, but in spite of it. The defendant's conduct led to the utter destruction of the title, so that the plaintiff received nothing. The money paid is in very truth the property of the plaintiff, and to allow the plaintiff to recover only \$2.50 per acre, the amount paid to the government, would be permitting the defendant to reap where it had not sown. Before the enactment by Congress of the statute of August 20, 1918, a cause of action had arisen in favor of the plaintiff and against the defendant, as for money had and received to the use of the plaintiff. That chose in action for the full purchase price it paid was the property of the plaintiff. To hold now that it cannot recover any of it, or at best only a fourth of it, is to say that, by the enactment mentioned, Congress intended to confiscate that property or the most of it, and not only so, but to confiscate it for the benefit of the defendant, which gave nothing for it. There is no hint of such an intent in the language of the statute, and it cannot be assumed. If that law is to be given the effect of preventing the plaintiff from recovering all it paid, it would impair the obligation of the defendant to repay the money it had taken from the plaintiff without giving anything in return. The obligation of this implied contract was in full force when the statute was enacted, and cannot be impaired by subsequent legislation. The plaintiff acquired the right to purchase the land from the government, not

because of any title that the defendant ever had, but because that title had been extinguished; and nothing passed to the plaintiff by reason of the contract.

For the purposes of this case it matters not whether the contract between the plaintiff and the defendant was or was not illegal, or whether or not the parties are equally to blame. If the contract was legal, the plaintiff was entitled to treat the failure of the defendant to perform as a rescission thereof, and recover the purchase price already paid. If the contract was illegal, it was yet in its executory stage, so that within the principle announced by this court in *Leadbetter v. Hawley*, 59 Or. 422 (117 Pac. 289, 505), the plaintiff could recover the money.

All the cases cited by the defendant on this point are those where the effort of the plaintiff had been to enforce the illegal contract. For instance, in *Jackson v. Baker*, 48 Or. 155 (85 Pac. 512), the defendant had contracted with the plaintiff and another that as soon as he should obtain title to his homestead, they should pay him \$1,000, in consideration of which he agreed to convey the title, when acquired, to Draper, but that, if he was unable to acquire title, he should repay the \$1,000. Having failed to perfect his homestead entry, he was sued by the plaintiff for recovery of the \$1,000. Thus, it is seen that one of the stipulations of the contract was that he should repay the money in certain contingencies, and the action was brought to enforce that illegal agreement. The litigation was clearly an affirmance of contract, and not a disaffirmance. The same is true of *Kremer v. Earl*, 91 Cal. 112 (27 Pac. 735). That was a suit to enforce specific performance of a contract to convey land, the title to which the defendants should thereafter acquire from the state for the sole use of the purchaser. In substance, it was required by the

statute under which the state sold the land that the purchaser should declare that no contract had been entered into looking to its alienation. Yet he had made such an agreement, and because of its illegality the court refused to enforce specific performance of it. The other citations of the defendant on this branch of the case are affected by the same principle. Here, the litigation is clearly not in affirmance of the contract said to be illegal. The place of repentance for the plaintiff had not yet been passed at the time it was instituted. The demurrer should have been overruled, but the plaintiff is entitled to recover the full purchase price which it has paid. REVERSED.

Mr. Justice BENSON concurs in this opinion.

Argued February 10, affirmed April 6, petition for rehearing denied October 5, second petition for rehearing denied November 16, 1920.

STATE v. HOLBROOK.

(188 Pac. 947; 192 Pac. 640; 193 Pac. 434.)

Criminal Law—Admission of Evidence of Experiments or Demonstrations Discretionary.

1. Admission of evidence of experiments or demonstrations is discretionary with trial court; but when it appears that the experiment or demonstration has been made under conditions similar to those existing in the case in issue, its discretion ought not to be interfered with.

On right of defendant in homicide case to introduce evidence of his good character, see notes in 103 Am. St. Rep. 891; 11 Ann. Cas. 1189.

On extent to which cross-examination is permissible to show hostility or ill will of witness, see note in Ann. Cas. 1914B, 537.

On general and common-law rules as to admission of evidence in action for homicide in the commission of felonies, see note in 63 L. R. A. 354.

Authorities discussing the question of general rule as to admissibility of evidence of character for peacefulness and quiet of deceased in action for homicide are collated in notes in 4 Ann. Cas. 338; 11 Ann. Cas. 229; 3 L. R. A. (N. S.) 368.

On admissibility of previous statements by a witness out of court consistent with his testimony, see note in 41 L. R. A. (N. S.) 857.

Criminal Law—Admission of Evidence as to Experiments Held not an Abuse of Discretion.

2. In homicide prosecution, admission of evidence as to experiments in tracing footprints, and in discharging rifle with certain kind of cartridge, to ascertain whether smoke could be seen from the discharge, where experiments were made under same conditions as existed on day of killing, *held* not an abuse of discretion.

Homicide—Testimony of Conversation of Deceased With Defendant's Employee Held Inadmissible.

3. In homicide prosecution, testimony by an employee of deceased as to a conversation between deceased and an employee of defendants relating to negotiations about employment of defendant's employee by deceased, *held* inadmissible.

Homicide—Testimony as to Ownership of Land on Which Homicide Took Place Held Inadmissible.

4. In prosecution for homicide, committed following a dispute as to the right to use land for grazing purposes, testimony of an abstractor as to ownership of lands by one of the defendants *held* inadmissible, particularly in view of concession by state that land was owned by one of the defendants.

Homicide—That Deceased Became Angry on Day Previous to Killing, Because of Inability to Lease Land, Inadmissible.

5. In prosecution for homicide, committed following a dispute as to use of land for grazing purposes, testimony as to appearance of anger on part of deceased on the day previous to the homicide, when he learned that he would be unable to lease land because of owner having sold it, *held* inadmissible.

Witnesses—Impeachment must be According to Statutory Method.

6. Under Sections 863, 864, L. O. L., a party to impeach the testimony of an adverse witness, must pursue the statutory method.

Criminal Law—Declarations of Deceased's Employee not Binding on Deceased.

7. In homicide prosecution, declarations by employee of deceased as to what deceased was going to do could not bind the deceased.

Witnesses—Inconsistent Statements, Used for Impeachment, must Relate to Testimony of the Witness.

8. Before a witness can be impeached, under Section 864, L. O. L., there must appear in his evidence something inconsistent with the statement said to have been made by him at some other time and place, and he cannot be impeached on some utterance not thus relating to his testimony.

Witnesses—Cross-examination may Show Hostility of Witness.

9. Under Section 704, L. O. L., it is competent on cross-examination to ascertain the mental attitude of a witness toward the defendant, whether of enmity, hostility or prejudice, and he may be asked if, at other times, specifying time, place and persons present, and the particular language used, he has not made statements indicative

of hostility towards the party against whom he has been called as a witness.

Criminal Law—Cross-examination to Impeach by Inconsistent Statements cannot be Justified on Ground That it Shows Bias and Prejudice.

10. When counsel informs court that he is proceeding to impeach the witness by inconsistent statements, he must adhere to that theory, and cannot justify examination on the ground that it is proper cross-examination for purpose of showing bias or prejudice, as a party cannot mislead the court and invite error.

Homicide—Turning of Bucks into Flock of Sheep not a Felony, Justifying Homicide.

11. In prosecution for homicide, committed after dispute as to use of land for grazing purposes, testimony as to the effect of turning a band of bucks into defendants' flock of sheep *held* inadmissible, since, even if deceased had been in the act of so doing, it would not have been a felony on defendant's property, justifying homicide.

Witnesses—Redirect Examination of Character Witnesses as to Defendant's Violation of Law Held Proper.

12. In homicide prosecution, where witnesses for state had testified as to the bad reputation of one of the defendants, and on cross-examination had admitted that the basis of their estimate of his reputation was some trouble he had had, redirect examination by state, eliciting that the trouble referred to involved a violation of law, *held* proper, having been brought on by defendants' cross-examination.

Homicide—Evidence as to Deceased's Reputation Held Competent.

13. In homicide prosecution, evidence that deceased's general reputation was that of a peaceable, law-abiding citizen *held* competent, to refute assertion that he was about to commit a lawless act at the time of the killing.

Criminal Law—Evidence of a Conversation Five Days Before Killing Held not Admissible as Res Gestae.

14. In prosecution for homicide committed as the result of a dispute in regard to the use of land for grazing, evidence as to a conversation between an employee of the deceased and a brother of one of the defendants five days before the killing *held* not admissible as a part of the *res gestae*.

Criminal Law—Instruction on Circumstantial Evidence Improper, Where Direct Evidence of Corpus Delicti.

15. If there is any direct testimony respecting the *corpus delicti*, an instruction on circumstantial evidence is properly refused.

Criminal Law—Instructions to be Directed to All of Legitimate Testimony.

16. The court is required to frame its instructions, so that the attention of the jury shall be directed to all of the legitimate testimony, not excluding any particular part.

Homicide—Instructions on Apparent Danger Held Favorable to Defendants.

17. In homicide prosecution, defended on ground of self-defense, instructions on apparent danger *held* favorable to defendant.

Homicide—Apparent Danger must be Considered from the Standpoint of a Reasonable Man.

18. The question of apparent danger must be considered from the standpoint of a reasonable man in the plight of the defendants at the time of the killing, under all the conditions then surrounding the parties as disclosed by the testimony.

Homicide—Instruction Requiring Apparent Danger to be Absolutely Established Held not Objectionable.

19. In homicide prosecution, instruction that apparent danger must be danger so urgent that the killing is "absolutely or apparently absolutely, necessary," *held* not objectionable as against contention that it required the danger to be mathematically established.

Indictment and Information—Facts to be Alleged in Direct Language Without Uncertainty.

20. Facts constituting the offense must be alleged in direct and positive language, without equivocation or uncertainty.

Criminal Law—Evidence Required to Prove Charge Merely Beyond Reasonable Doubt.

21. The evidence for the prosecution need not go further than to convince the jury beyond a reasonable doubt, to a moral certainty, of the truth of the charge.

Homicide—Defendant, Claiming Self-defense, Required Merely to Raise a Reasonable Doubt.

22. In prosecution for homicide, where defense was that there was either actual or absolute danger, or the reasonable appearance of such danger against which defendant acted in self-defense, he was not required to prove such defense to a mathematical certainty, but merely to raise a reasonable doubt of his guilt in the minds of the jurors.

Homicide—No Accessory Before Fact in Case of Manslaughter Committed in Heat of Passion.

23. There can be no accessory before the fact in a case of manslaughter by one acting on a sudden heat of passion, though more than one person may be actuated at the same time by a sudden heat of passion caused by a provocation applicable to all of them, apparently sufficient to make the passion irresistible, so that both will be guilty of manslaughter.

Homicide—Evidence Sufficient to Sustain Conviction of Two Defendants for Manslaughter.

24. In homicide prosecution, *held*, on appeal from conviction of two defendants for manslaughter, that the evidence was sufficient to

warrant jury in concluding that both defendants had been actuated by a sudden heat of passion and had fired at deceased at the same time.

Homicide—Instruction on Justifiable Homicide Held Proper.

25. In prosecution for homicide, committed as the result of a dispute concerning use of land for grazing of sheep, the giving of an instruction that homicide is justifiable when committed to prevent the commission of a felony on the property of person who does killing, or on property in his possession, or in any dwelling-house where such person may be, *held* proper under the evidence.

Homicide—Instruction on Justifiable Homicide Held Harmless.

26. In prosecution for homicide, committed as the result of a dispute concerning use of land for grazing of sheep, instruction that homicide is justifiable when committed to prevent commission of a felony on property of person who does killing, or on property in his possession, or in any dwelling-house where such person may be, if error, *held* not ground for reversal on defendants' appeal, being favorable to defendants.

ON PETITION FOR REHEARING.

Criminal Law—Guilt or Innocence a Question for Jury.

27. The question of defendant's guilt or innocence is exclusively for the jury; the Supreme Court's only duty on appeal being to ascertain whether there was sufficient evidence to carry the case to the jury.

Homicide—Whether Defendant had Fired Shot, or Been Mere Bystander, Held for Jury.

28. In a homicide prosecution, involving the issue of whether defendant had been a mere bystander, or had fired one of the shots that had struck deceased, evidence *held* sufficient for submission to the jury of the guilt or innocence of such defendant.

Homicide—Defendant Guilty of Manslaughter, Though Shot was not Necessarily Fatal.

29. A defendant who fired one of the shots that struck deceased, is guilty of manslaughter, under Sections 1897, 1902, L. O. L., where such shot contributed to deceased's death, though the shot was not necessarily fatal, and though the shot fired by other defendant was necessarily fatal.

Homicide—Evidence Held to Make Self-defense a Question for the Jury.

30. In a homicide prosecution, involving self-defense issue, evidence *held* sufficient for submission to the jury.

Criminal Law—Question on Which Evidence is Conflicting is for the Jury.

31. Where the evidence was conflicting, the question of defendant's guilt or innocence was for the jury.

Homicide—Evidence That Body Could have Been Moved Without Leaving Footprints Held Admissible.

32. In homicide prosecution, where it was claimed that defendants had moved decedent's body subsequent to his death, but there were no footprints surrounding the body, where it lay when the officers arrived, evidence that the body could have been moved without leaving such footprints *held* admissible.

Criminal Law—Exclusion of Evidence not Considered in Absence of Answer and Specification in Brief.

33. Refusal to permit answer to question will not be considered where record does not disclose answer witness would have given, if permitted to testify, and where appellant fails to point out in his brief wherein he was injured by the refusal to permit witness to answer.

Homicide—Decedent's Peaceableness Admissible, Where Character Assailed.

34. The state cannot, as a part of its primary case, offer evidence concerning decedent's reputation as a peaceable and quiet person, but generally can offer such evidence in rebuttal, if decedent's character for peaceableness is assailed by the accused.

Homicide—Where, Self-defense is Pleaded, State may Show Decedent's Peaceableness.

35. In a homicide prosecution, the plea of self-defense, with evidence tending to support it, *held* a sufficient attack on decedent's character for peace and quiet to entitle the state to submit rebuttal evidence of his good reputation for peaceableness.

Criminal Law—Error not Listed Among Assignments not Considered.

36. Alleged error not listed among the assignments of error will not be considered.

Criminal Law—Defendant's Reputation Confined to Trait Involved in Offense Charged.

37. Generally, evidence as to defendant's reputation must be confined to the trait involved in the crime charged.

Witnesses—Cross-examination as to Defendant Being Charged With Theft Held Proper.

38. In homicide prosecution, where character witness for defendant had testified on direct examination that defendant's reputation was that of a law-abiding citizen, cross-examination as to defendant having been charged with theft *held* proper.

Criminal Law—Appellants cannot Complain of Testimony, in Absence of Motion to Strike or Objection.

39. Appellants cannot complain of admission of testimony to which they did not object, and which they did not move to have stricken.

Criminal Law—Homicide—Rule That Assignments not Argued are Waived Disregarded in Homicide Prosecution.

40. Generally, assignments of error not argued by appellant will be treated as having been waived, but such rule will be disregarded in homicide prosecutions, since in such cases the liberties of the defendants are involved.

SECOND PETITION FOR REHEARING.

Criminal Law—Distance of Witnesses from Scene Does not Make Testimony Circumstantial so as to Require Instruction Thereon.

41. The fact that witnesses who testified to seeing the petitioning defendant raise his arm and shoot were so far from the scene of the shooting that they could hear none of the conversation between the parties does not make their testimony circumstantial, so as to entitle that defendant to an instruction as to conviction on purely circumstantial evidence.

From Klamath: DELMON V. KUYKENDALL, Judge.

In Banc.

Under an indictment charging them with the crime of murder in the second degree by killing O. T. McKendree, the defendants were convicted of manslaughter, dissatisfied with which, they appeal.

AFFIRMED.

For appellants there was a brief over the name of *Messrs. Renner & Chastain*, with an oral argument by *Mr. W. H. A. Renner*.

For the State there was a brief over the names of *Mr. W. M. Duncan*, District Attorney, *Mr. W. S. Wiley*, Deputy District Attorney, *Mr. W. Lair Thompson* and *Mr. Thomas Drake*, with oral arguments by *Mr. Duncan* and *Mr. Thompson*.

BURNETT, J.—The scene of the homicide described in the indictment is Dry Prairie, a plateau approximately four or five miles square, in Klamath County. There are some ridges in the plain, and it

is surrounded by wooded hills. In the immediate vicinity of the killing, tussocks of short grass were growing in a sandy soil, about six inches apart on the average. It was a suitable place for keeping sheep during the lambing season. The decedent was the owner of a band of about 2,500 sheep, in charge of a Spaniard named Jim Santiago, who, it appears, claimed a one-fourth interest therein under a contract for the purchase of the same from the decedent, and for which he had not yet completed the payment. It is claimed on behalf of the prosecution that Santiago had gone into Dry Prairie several days prior to the homicide, and likewise before the advent of the defendants with another band of sheep owned by the defendant, Holbrook, and his brother, and accompanied by Paddock as an employee of the Holbrooks.

It is contended by the defendants that, as they approached the prairie from the southeast over the adjacent hills, they had a full view of the valley and saw no sheep there at all. It soon developed, however, that Santiago was there with sheep, and some discussion took place between himself and the defendants from time to time about his rights there. During their interview Paddock asserted control of the land where Santiago was then camped, whereupon the latter on the next day moved his camp farther north and established it on a portion of the public domain. Meanwhile, the defendants had made their camp, consisting of two tents facing eastward, at a point approximately 1,900 feet south, 35° 25' west from the camp of Santiago, as the latter was last established.

It seems that, when Santiago learned of the coming of the defendants and of their claim to the grazing on the prairie, he sent word to McKendree, who was

then at Klamath Falls, about 30 miles distant. McKendree came to Dry Prairie on the morning of April 20, 1918. At that time his sheep were in the western part of the prairie, south of some springs near which were some shearing corrals. He went there and found Santiago. All this time McKendree was riding on a white horse and was armed with a repeating rifle. He returned with Santiago, traveling in an easterly direction towards the latter's camp. On arriving at a point approximately north of the camp of the defendants, described by Santiago as "about half of a quarter of a mile" away, they separated, Santiago going towards his own camp, and the decedent riding directly to the camp of the defendants.

Digressing here, it is contended by the defendants and their witnesses that the decedent came to their camp before going west to the springs. On his arrival at their tents, as they state, he quarreled with them and called them vile names, threatening to "blow their caps off," leveling his rifle at them and compelling them to come out from their tent at the point of his gun, and demanding that they leave the prairie. He had dismounted, as they say, and at this juncture his horse broke away from him, whereupon he pursued on foot and caught it, some distance east of their tents. He there mounted the horse and proceeded on a northwesterly course towards the springs already mentioned, calling out to them as he passed that, if he caught either of them he would beat him so his mother would not know him. He then went on in that direction, and later returned, as already stated, making the first time he appeared at their camp according to the theory of the prosecution, and

the second time as the defendants assert. They say that he rode up and renewed the quarrel, demanding that they leave, claiming that there was not room enough in the prairie for two bands of sheep. Paddock contended, according to the defendants' story, that he had before that kept sheep there through the lambing season when other bands were there, insisting that he had a better right there than anyone else, on account of having filed an application for a stock-raising homestead under the act of Congress of December 29, 1916 (U. S. Comp. Stats. 1918, U. S. Comp. Stats. Ann., Supp. 1919, §§ 4587A-4587K; Fed. Stats. Ann., Supp. 1919, pp. 708-711), entitled "An Act to provide for stock-raising homesteads, and for other purposes."

Among other things attributed to the deceased by the defendants in that altercation was a statement by McKendree that he was going to turn into the valley 600 bucks and that Holbrook would have to herd them. They ascribe to him various threats of personal violence as he sat on his horse. At this time Holbrook was inside of or in the entrance to the larger tent of the two and Paddock was outside, some 20 or 30 feet distant, near a wagon standing there. The defendants say that McKendree rode his horse against Paddock and forced him back several steps, and started to raise his gun, when Holbrook fired two shots in quick succession from a rifle which he had in hand at the time, all while McKendree was facing him. Frightened by the shots, the horse whirled and started towards the Santiago tent and McKendree fell off. One of the shots passed through his body, entering the chest above the heart, severing the aorta and the vena cava, and lodged in the muscles of the back after fracturing the

fifth and sixth ribs. This shot was shown to be by a soft-nosed bullet which, as some witnesses described it, practically exploded inside the body after striking some bones. The defendants contend that Holbrook fired both shots and that Paddock was not armed and did not shoot at all. They maintain that he was an innocent bystander.

The direct testimony for the state as to the killing itself comes from Santiago and another Spaniard named Emanuel Garcia. The former narrates that, acting under directions of McKendree after separating, he shouted to Garcia, who was at the Santiago tent, to get a saddle-horse for him, as he was going to accompany McKendree some seven or eight miles away to find new pasture for their sheep. He says that he watched McKendree continually as the latter rode towards the tents of the defendants and until he was killed; that the deceased rode up in front of the two tents occupied by the defendants and dismounted; that after some ten minutes' conversation which Santiago could not hear from his distance, McKendree remounted his horse and started to turn to the right, when one shot was fired from the larger tent; and that, as the horse whirled and started to run in fright, the other defendant, who had stood outside the tent participating in the conversation, fired another shot with a pistol. Medical men who were witnesses for the state testified in substance that there was a gunshot wound entering from the back of the deceased, fracturing the neck of the shoulder-blade and passing through the body upward at an angle of about forty-five degrees, the exit being just under the collar-bone, making a clean-cut wound through the body.

Garcia declares that, having heard the shouted orders of Santiago he left his camp and went to get Santiago's horse, traveling approximately southeast until he arrived at a point, as shown by the maps introduced, almost due east from the tents of the defendants, at a distance of 2,550 feet. He describes the occurrences after McKendree arrived at the defendants' camp substantially as related by Santiago, and particularly the fact that the man outside the tent fired a pistol shot immediately after the fatal shot, and as the horse turned to run. Santiago, as he says, mounted his horse as soon as he could saddle it, rode some miles to a telephone and gave information of the homicide to the deputy sheriff. Some of the party of employees with the defendants did the like.

It is in testimony that individuals who arrived there some two hours after the killing were not permitted to go near the body, but were invited to sit down in the larger tent, and were cautioned by the defendants not to disturb two empty cartridge shells that were lying in front of the tent. The defendants claimed not to have touched the body or to have gone near it, or disturbed anything on the scene, from the time McKendree fell from his horse.

The medical experts declare that the wound severing the blood vessels mentioned was instantly fatal, and that the wound through the shoulder-blade would at once disable that arm, so that it would be incapable of holding or carrying a rifle. A witness for the state, who was the first to arrive there of anyone except the defendants and their employees, but who claimed that his eyesight was not very good, came near the defendants' tents and was told by them that there was a dead man there, but that they said, "we will not say who killed him." The witness claims to

have looked casually in the direction of the dead body, and to have seen that it was lying on its back, with its right leg bent, with the knee upward and a gun lying on the west side, with the butt northeast and the barrel west, and that the body was about ten steps away from the tent. Other witnesses, who came later described the corpse as lying 96 feet away from the larger tent and 80 feet from the smaller one, and exhibit photographs showing that it was lying on its back, with the left leg extended on a line with the body, and the right leg lying full length at an angle, as if the feet were spread apart. The right arm was extended flat on the ground to the right, at right angles with the body, and the left arm bent up, with the hand resting approximately on the left collar-bone. As shown in the photographs, the butt of the gun rested on the ground at the left side of the body, and the barrel lay against the body approximately at the left nipple, projecting above the chest at an angle of about 45 degrees.

The witnesses for the state testify that, in addition to the two rifle shells found immediately in front of the larger tent, there was also discovered an empty shell from a Luger pistol some ten feet farther away towards the wagon, and that when the coroner arrived a pistol of that make was produced by one of the defendants from the seat of that wagon from under a covering canvas. One of the witnesses for the state testified that on examination this pistol seemed to have been recently fired, but that its magazine was full of cartridges. It is a contention of the state that between the time of the killing and the advent of the officers the defendants had moved the body and had so arranged it as to give rise to inferences favorable to themselves. There was testimony

to the effect that there were no footprints near the body as it lay in the position shown in the photographs, but that there were some at the point where the tracks of the horse show he had whirled in his fright. In connection with that matter, the state put in the testimony of two witnesses to the effect that ten days after the homicide, and while the conditions were the same as on the day of the killing, they had made experiments in walking about on the tussocks of grass already mentioned, to see if they would make tracks, and they stated that, although they watched each other while thus engaged, they could not discover that any visible track was made.

It is said by the defendants, in substance, that immediately after the shots which were fired at McKendree a rifle shot was fired in their direction from the Santiago tent, and that they saw the smoke of the shot, and saw Santiago dodging behind his tent. During the trial at Klamath Falls, witnesses for the state took cartridges of the kind found in Santiago's gun, and went out to a plain near Klamath Falls, where there was a background of green timber in the distance, and fired several shots in the presence of observers stationed at substantially the same distance away as between the two camps already mentioned, and they testified that there was no smoke visible. The admission of testimony about these experiments is assigned as error.

It is claimed by the defense that McKendree and Santiago, in going from the springs in the northwest part of the prairie eastward towards the camp of the latter, passed a witness named Blodgett and another man named Barclay Holbrook, who were in the employ of the defendants. On cross-examination, Santiago was asked to tell what was said between Blod-

gett and McKendree. He stated in substance that Blodgett sought employment of McKendree, who told him when he finished his work for the defendants to come to him and he would give him employment. Later on in the trial the state sought to introduce some declarations of McKendree, made prior to his turning south to the defendants' camp. On objection of the defendants to this testimony as not being part of the *res gestae*, the court excluded it, and stated in substance that he would not permit anything to go in as *res gestae* occurring prior to the time that McKendree separated from Santiago and turned south to the Holbrook camp.

As part of their defense, the defendants called as a witness an abstractor and sought to have him testify about his examination of the county deed records, and to state what they disclosed about land owned by the defendant Paddock. The state objected to this as to any other lands than that where the homicide occurred, and contended that the evidence offered was not competent to show title, but conceded that the defendants could show title in one of them to the land on which the killing occurred. Nothing further, however, seems to have been attempted along this line. This ruling was also objected to by the defendants. They also offered to show by Mrs. Fordney that on the day next prior to the homicide, while en route from Klamath Falls to where he was killed, McKendree called upon her and endeavored to lease from her for grazing purposes some land which he thought she owned in Dry Prairie, but on being informed that she had previously sold it, he appeared to be angry. This offer was rejected and the defendants assign error on the refusal.

After Santiago had been dismissed from the witness-stand at the close of his cross-examination, the defendants recalled him for further cross-examination. As the counsel was proceeding to interrogate him, the court inquired if the defendants were laying a foundation for an impeaching question. Being answered in the affirmative, the judge informed counsel of a rule of court that impeaching questions should be in writing and a duplicate furnished to the court. The witness was then dismissed temporarily, and later they propounded a question which, eliminating profanity and obscene epithets said to have been applied to the defendants, reads thus:

“Did you not, on the public road leading from Bonanza to Bly, in Klamath County, Oregon, on the afternoon of April 17, 1918, say to Henry C. Lemler, ‘I am in trouble. You know Holbrook and Paddock (or Maddock) got six hundred acres say he got sixteen hundred acres. I see Mr. McKendree and he shoot them (or sue them) and get it all. I know McKendree he fix them plenty,’ or words to that effect?”

The court sustained objections to this question and refused to permit Santiago to answer the same, and later would not allow Lemler to answer it, all of which is assigned as error. The defendants also complained that the court would not permit a witness called by them to testify as to the result of turning 600 bucks into a flock of lambs and ewes.

The defendants offered testimony of several witnesses to the effect that the reputation of the defendant Holbrook for being a peaceable, law-abiding citizen was good. In rebuttal the state offered the testimony of a number of witnesses to the effect that he was of ill repute in that respect. Cross-examining the state’s witnesses, the defendants elicited from

some of them that the basis of their estimate of his reputation was some trouble he had had about some sheep, and on redirect examination of those witnesses in some instances the state brought out that the trouble involved a violation of law. It is assigned as error that the court permitted the state to give evidence to the effect that the deceased had the reputation of being a peaceable, law-abiding citizen, and they complain that the court would not allow them to put in evidence a conversation which occurred between a brother of the defendant Holbrook and the witness Santiago on Monday, April 15th, before the killing on Saturday, April 20th. No offer of what the witness would testify in answer to such questions was made.

In respect to instructions asked and refused the assignment of error is couched in this language:

“The court erred in refusing to give and ignoring all the instructions offered at the trial, on behalf of both the plaintiff and defendants, and on its own motion gave instructions; in doing so the court assumed the burden and responsibility to give all the law absolutely correct; and the court under such circumstances would not be permitted to in the least jeopardize the interests of the defendants, and having failed to give all the law correctly, it committed grievous error to the prejudice of the defendants.
* *

“The court further erred in the law in this case in refusing to give all of the defendants’ instructions; and it further erred in refusing to give any of defendants’ instructions, especially instruction No. 10. And the court erred in giving instruction on its own motion and without request, that is not the law in the case on abstract propositions of law not based upon evidence in the case to support them, and the instructions of the court were given in the negative, vague and ambiguous and as a whole series

were misleading to the jury, conveying an impression upon the jury, the idea that someone must be convicted of some crime * * "

In general terms, without specifying any particular part of the charge, the defendants claim that the court erred in submitting the question of manslaughter to the jury. They maintain that the "instant case is either murder or justifiable homicide," and they urge that there was no evidence from which the jury would be authorized to return a verdict of manslaughter in any event. Specifically, they assign as error the following excerpts from the charge to the jury:

1. "You will understand from this that you may find one defendant guilty and the other not guilty, or you may find both guilty but in different degrees; that is, your verdict need not be the same for both defendants."

They insist that the court thereby told the jury that it must find one of the defendants guilty.

2. In charging the jury that justifiable homicide is the taking of human life in self-defense "to prevent the commission of a felony on the property of such person, or upon property in his possession, or upon or in any dwelling-house where such person may be."

3. In eliminating the principle of apparent danger, in this language: "And had reason to believe that his life was in danger, or that he was in danger of great bodily harm. To excuse homicide, the party must act under an honest belief, well founded that it is necessary to take life to prevent great bodily harm."

4. Exception is taken to this language: "It must be danger so urgent that the killing is absolutely or apparently absolutely necessary, and the danger must not have been brought on by the slayer."

In general terms, without specification of the particular language to which the defendants object, it is assigned as error, in substance, that the court was wrong in instructing the jury as to the law applicable to aiders and abettors, contending that "such instruction was an abstraction, and without evidence to warrant a jury to find the defendants guilty of manslaughter," on the ground, as defendants argue, "that there can be no accessories to voluntary manslaughter."

1, 2. Concerning the experiments about tracing footprints on the grass at the scene of the homicide, and whether or not smoke could be seen from the discharge of a rifle loaded with a certain kind of cartridge, it is enough to say that, as stated by Mr. Justice LORD in *Leonard v. Southern Pacific Co.*, 21 Or. 555 (28 Pac. 887, 15 L. R. A. 221):

"In all cases of this sort, very much must necessarily be left to the discretion of the trial court; but when it appears that the experiment or demonstration has been made under conditions similar to those existing in the case in issue, its discretion ought not to be interfered with."

As to the tracking experiment, the preliminary testimony was to the effect that the conditions were substantially the same as on the day when the killing occurred, and there is no testimony in the record to dispute this basis for the experiment. As to the ability to see smoke from a discharge of a rifle, the evidence was to the effect that the cartridges were charged with what is known as smokeless powder, and were of the same kind as those with which Santiago's gun was loaded, and that on both days, that of the homicide and that of the experiment, the atmosphere was clear and the background was similar, so that the

court was well within its discretion in allowing the testimony relating to both experiments. The objections of the defendants go more to the weight of the experiment testimony than to its competency. The question has been considered lately in the case of *Kohlhagen v. Cardwell*, 93 Or. 610 (184 Pac. 261), in an opinion by Mr. Justice BENNETT, where the authorities are reviewed, constituting the latest expression of this court on that subject.

3, 4. As already noted, the testimony of Santiago about the conversation between Blodgett and the decedent related only to negotiations about the employment of the former by the latter. It was immaterial matter, brought out on cross-examination, and, besides this, there was no offer, as disclosed by the record, to show what Barclay Holbrook would testify on this point. The ruling of the court in this instance was not erroneous, nor was it wrong to reject the proffered testimony of the abstractor about his examination of the records with regard to what they showed about the ownership of lands by the defendant Paddock, especially in the light of the concession of the state, by its counsel, that the defendants might show title, if they could, in either of them to the land on which the homicide occurred.

5. The appearance of anger on the part of the decedent on the day previous to the homicide, when he learned that Mrs. Fordney could not lease the land to him, because she had sold it, is something utterly foreign to the issue in hand, and was properly excluded from the testimony.

In respect to the question propounded to Santiago about what he said to Lemler on April 17th when he was going towards Bly, which question the court refused to allow either Santiago or Lemler to answer,

we remember that, as shown by the record, counsel for the defendants stated to the court that they asked the question to lay a foundation for the impeachment of Santiago. There are two methods described by our Code by which a witness can be impeached:

“A witness may be impeached by the party against whom he was called, by contradictory evidence, or by evidence that his general reputation for truth is bad; or that his moral character is such as to render him unworthy of belief, but not by evidence of particular wrongful acts, except that it may be shown by the examination of the witness or the record of the judgment that he has been convicted of a crime”: Section 863, L. O. L.

“A witness may also be impeached by evidence that he has made, at other times, statements inconsistent with his present testimony; but before this can be done, the statements must be related to him, with the circumstances of times, places, and persons present; and he shall be asked whether he has made such statements, and if so, allowed to explain them. If the statements be in writing, they shall be shown to the witness before any question is put to him concerning them”: Section 864, L. O. L.

“Impeach” is a statutory word, and if a party would thus attack the testimony of an adverse witness, he must pursue the statutory method: *State v. Askew*, 32 Idaho, 456 (184 Pac. 473). It is manifest that the effort to impeach Santiago cannot be classified under Section 863, L. O. L. There is no attempt in the record to show that his general reputation for truth is bad, or that his moral character is such as to render him unworthy of belief, and evidence of any particular wrongful act on his part would be excluded under the terms of that section. The attempt to impeach him is therefore confined to the requirements of Section 864. In other words, it

would be necessary to show by the impeaching question that he had "made at other times statements inconsistent with his present testimony."

7. The testimony of Santiago included a narration of the occurrences as he viewed them on the day of the homicide, and that he was on Dry Prairie with the McKendree sheep before the arrival of the defendants with the flock in their charge. The profanity and obscene epithets applied to the defendants, as indicated in the proposed impeaching question, were not inconsistent with any recital of his as a witness. There is no indication, in what he said in testifying, that he pretended to be friendly to either of the defendants. Indeed, he says of his conversation with one of them that they were both somewhat angry, and there is nothing at variance with that attitude as disclosed in the impeaching question. His declarations about what McKendree would do could not bind the latter: *State v. Burns*, 25 S. D. 364 (126 N. W. 572); *People v. McBride*, 120 Mich. 166 (78 N. W. 1076); *Menges v. State*, 25 Tex. App. 710 (9 S. W. 49); *United States v. Cohn*, 128 Fed. 615. Moreover, Santiago made no mention of that matter in his testimony.

8. As governed by the statute, before a witness can be impeached under Section 864, there must appear in his evidence something inconsistent with the statements said to have been made by him at some other time and place. He cannot be impeached on some utterance not thus related to his testimony in the case. We remember, indeed, that:

"A witness is presumed to speak the truth. This presumption, however, may be overcome by the manner in which he testifies, by the character of his testimony, or by evidence affecting his character or mo-

tives, or by contradictory evidence. * * " Section 704, L. O. L.

9, 10. Under this section it is competent on cross-examination to ascertain the mental attitude of the witness towards the defendant, whether of enmity, hostility or prejudice. As the rule is stated in such cases as *State v. Stewart*, 11 Or. 52 (4 Pac. 128), *State v. Ellsworth*, 30 Or. 145 (47 Pac. 199), and others, he may be asked for this purpose if at other times, specifying time, place and persons present and the particular language used, he has not given voice to utterances indicative of hostility towards the party against whom he has been called as a witness. The procedure for eliciting such statements for the purpose of showing the hostility of the witness is the same as that to be employed in bringing out inconsistent statements; but the purpose of the two is entirely different. One is to discredit the motives of the witness, and the other is to put in operation the formula laid down by the statute for his impeachment. The latter does not necessarily imply hostility. The two are not to be confounded, and when the defendant by his counsel informs the court that he is proceeding to impeach the witness, he must adhere to that theory. He is not entitled to mislead the court and invite error. He cannot in one breath contend that he is proposing to impeach the witness, and in the next say that he was endeavoring to show bias or prejudice. As an effort to impeach the witness Santiago, the question propounded was clearly inadmissible, and the defendants were not entitled to follow it up by the testimony of Lemler to the effect that Santiago made the statement thus attributed to him.

11. It is not pretended that the decedent was in the act of turning a band of bucks into the flock of the defendants, and even if such were the case, it would not be a felony upon the defendants' property in any event, justifying homicide in the defense of it. Hence, the court was right in not permitting the defendants' witness to testify about the effect of such an action.

12. The matter upon which the character witnesses on the part of the state, who testified against the reputation of the defendant Holbrook, based their opinion, was brought out on cross-examination by defendants' counsel, and cannot be complained of by them.

13. A defense urged by Holbrook and Paddock was substantially that McKendree was about to commit a felony upon them, by shooting them with his rifle. It was competent to show that McKendree's general reputation was good for being a peaceable, law-abiding citizen. This would have a tendency to refute the assertion that he was about to commit a lawless act. In a sense, it was an issue whether or not McKendree was about to violate the law, and his reputation above mentioned would tend to disprove that charge. In principle it is the same as the testimony adduced by the defendants in their own favor on the same feature.

14. The conversation between Letcher Holbrook and Santiago on the Monday previous to the killing was not part of the *res gestae*. No foundation was laid for impeaching Santiago in that matter. Neither was there any offer on the part of the defendants to show what Letcher Holbrook would have testified, had he been permitted to speak on that subject.

The tenth request of the defendants to instruct the jury, upon the refusal of which they predicate error, reads thus:

“In this case some of the conclusions sought to be established by the state depend upon what is known in law as circumstantial evidence. To warrant a conviction on circumstantial evidence, to justify any conclusion leading to conviction, every single fact essential to such a conclusion must itself be proved by competent evidence beyond a reasonable doubt, and all the facts necessary to establish such a conclusion must be consistent with each other and with the conclusion sought to be established, and all the circumstances taken together must be sufficient to establish that conclusion, and to produce reasonable and moral certainty that it is true. No person can be convicted on circumstantial evidence, unless each circumstance essential to the conclusion of guilt is itself established to the satisfaction of the jury and beyond a reasonable doubt, and all of these circumstances, taken together, must produce a reasonable and moral certainty in the mind of the jury that the conclusion sought to be established is true. The mere union or combination of any number of independent circumstances each of an imperfect and inconclusive character will not justify a conviction, but, on the contrary, they must be such as to generate and to justify full belief beyond reasonable doubt of the guilt of the defendant. It is not sufficient that the circumstances proved coincide with, or render probable, the guilt of the defendant, but they must exclude every other reasonable hypothesis. No probability, nor any number of probabilities, nor any degree of probability, will be sufficient, for nothing short of proof beyond reasonable doubt of the guilt of the defendant is sufficient to justify his conviction. No other conclusion but that of the guilt of the defendant must fairly and reasonably arise from, or grow out of, the evidence, and the facts established must be absolutely incompatible with innocence, and incapable of explanation upon any other rational

hypothesis than that of guilt, or the defendant must be acquitted."

In *Blanton v. United States*, 213 Fed. 320 (Ann. Cas. 1914D, 1238, 130 C. C. A. 22), the court used this language:

"The most serious complaint is of a denial of a request respecting circumstantial evidence, which was not correctly covered by the general charge. We think, however, the denial was right. After the first few words, the request proceeded on the erroneous assumption that the evidence against the accused was entirely circumstantial, speaks of the strength of such evidence essential for conviction, and says it should always be cautiously considered. A requested instruction is always properly refused, unless it ought to have been given in the very terms in which it is proposed: *Brooks v. Marbury*, 11 Wheat. 78 (6 L. Ed. 423). An instruction as to evidence which would have a tendency to direct the minds of the jury from the controlling effect which other proper evidence may have on their decision should be refused: *Ayers v. Watson*, 137 U. S. 594 (34 L. Ed. 803, 11 Sup. Ct. Rep. 201). A court may properly decline to give an instruction which would tend to mislead the jury: *Agnew v. United States*, 165 U. S. 36 (41 L. Ed. 624, 17 Sup. Ct. Rep. 235, see, also, Rose's U. S. Notes). A request to instruct the jury upon a part only of the testimony is objectionable: *Smith v. Condry*, 1 How. 28 (11 L. Ed. 35)."

15. By the great weight of authority the doctrine of the cases is that an instruction on circumstantial evidence, such as the defense propounded in the instant case, is proper only when the prosecution relies exclusively on that class of testimony. On the other hand, if there is any direct testimony respecting the *corpus delicti*, an instruction on circumstantial evidence is properly refused. To give such a direction,

where direct testimony is in the record would tend largely, in effect, towards saying to the jury:

"You may lay aside for the present all direct testimony respecting the crime charged, take up the circumstantial evidence, and, if you find that no other reasonable conclusion than the guilt of the defendant can be derived from such circumstantial evidence, you may find him guilty; otherwise, you must acquit him."

16. This would be a partial and biased view of the case. The court is required to frame its instructions so that the attention of the jury shall be directed to all of the legitimate testimony, not excluding any particular part. The text in 16 C. J. 1008, lucidly explains the proposition. See, also, the following precedents: *People v. Raber*, 168 Cal. 316 (143 Pac. 317); *People v. Lonnen*, 139 Cal. 634 (73 Pac. 586); *State v. Link*, 87 Kan. 738 (125 Pac. 70); *State v. Calder*, 23 Mont. 504 (59 Pac. 903); *State v. McKnight*, 21 N. M. 14 (153 Pac. 76); *Foster v. State*, 8 Okl. Cr. 139 (126 Pac. 835); *Brannon v. State*, 149 Ga. 787 (80 S. E. 7); *People v. Dougherty*, 266 Ill. 420 (107 N. E. 695); *People v. Bonifacio*, 190 N. Y. 159 (82 N. E. 1098); *State v. Neville*, 157 N. C. 591 (72 S. E. 798); *Barnard v. State*, 88 Tenn. 183 (12 S. W. 431).

This explicit direction appears in the charge to the jury:

"If you find from all the evidence that it has not been proved beyond a reasonable doubt that a defendant or defendants committed one of these crimes, then you will find such defendant or defendants not guilty."

The same principle is reiterated elsewhere in what the judge said in charging the jurors. In view of

such language, it cannot be said of a truth that he in anywise required the jury to find either or both of the defendants guilty.

In the main, the exceptions to the charge of the court to the jury are founded upon small excerpts from the body of the document; in some instances, on parts of a sentence. It is written large in the instructions that the defendants are entitled to act upon appearances of danger and are not confined to actual danger. For instance, the judge said to the jury:

“A person has a right to protect his life or his person from great bodily harm, and he may even go to the extent of repelling any attack upon him by using a dangerous weapon, if the same is necessary or apparently necessary, to save his own life, or his person from great bodily harm. The danger, in fact, need not be real, but only apparent, if the assailed at the time honestly believed, and had reason to believe, that his life was in danger, or that he was in danger of great bodily harm.”

17, 18. So far as apparent danger is concerned, these instructions were as favorable as the defendants could ask. It might be remarked in passing that they were subject to objection on the part of the state in this, that they left the appearance of danger or actual danger to the judgment of the defendants, without regard to whether they were acting as reasonable men would under such circumstances, and in such a situation as the defendants were placed at the time. The law is that the matter must be considered from the standpoint of a reasonable man in the plight of the defendants at the time, under all the conditions then surrounding them, as disclosed by the testimony. The right to kill a human being in self-defense can-

not be committed to the judgment of an unreasonable man, whether actuated by anger or cowardice.

19. Based on the language of this court in *State v. Glass*, 5 Or. 73, and *State v. Caseday*, 58 Or. 429 (115 Pac. 287), the defendants object to this language of the trial judge:

"It must be danger so urgent that the killing is absolutely or apparently absolutely necessary, and the danger must not have been brought on by the slayer."

Disregarding the phrase "apparently absolutely necessary," the argument for the defendants is that the word "absolutely," as otherwise used in the excerpt just quoted, requires that the danger against which the defendants are entitled to act must be mathematically established, which would be to require of the defendants more than can be accomplished by any human being. In *State v. Porter*, 32 Or. 135, 157 (49 Pac. 964, 970), this court, speaking by Mr. Justice WOLVERTON, approved the instruction touching the law of self-defense to the effect that the danger "must be absolute, imminent, and unavoidable, or the defendant must, from all the circumstances, have honestly believed it to be so." The court there placed its approval of the instruction upon the ground that the language was coupled with the alternative expression about the belief of the defendant in the imminence of the danger, and drew the conclusion that, with this explanation, the jury could not have been misled by the language complained of. In *State v. Glass*, followed by *State v. Caseday*, the court condemned an instruction requested by the defendant that—

"The hypothesis contended for by the prosecution must be established to an absolute moral certainty,

to the entire exclusion of any other hypothesis being true, or the jury must find the defendant not guilty."

A similar request was denied in the Caseday case. The Porter case may be easily distinguished from those of Glass and Caseday.

20-22. The matter is best illustrated by an analogy. It is necessary for the state, in accusing a defendant of a crime, to allege the facts constituting the offense in direct and positive language without equivocation or uncertainty. So to speak, a mathematically certain declaration is required, but it is not demanded that in support of such an accusation the state must adduce a mathematical demonstration. The evidence for the prosecution need not go further than to convince the jury beyond a reasonable doubt, to a moral certainty, of the truth of the charge. On the other hand, in a sense, the defendant urges in his defense under the plea of not guilty that there was either actual or absolute danger, or the reasonable appearance of such danger, against which he acted in self-defense. The measure of proof required of him in such a case is not mathematical demonstration, but enough merely to raise a reasonable doubt of his guilt in the minds of the jurors. Where Glass and Caseday were involved, the subject under discussion was the *quantum* of proof; while as to Porter there was under consideration the ultimate fact in the alternative of actual, or, in other words, absolute danger, or the appearance of the same, towards which the defendant should direct his efforts in the matter of proof. There the measure of proof was not under consideration, as it was in the other two precedents. The present issue is governed by the doctrine of the Porter case. It is not within the reasoning of the opinions in either of the others.

"Absolutely" is not an accurate expression as applied to the measure of proof, but is rightly predicated of an allegation. In some instances difficulty on the part of jurors in distinguishing between averment and proof in the employment of the word would suggest as safer the use of other language in instructions, so as not to stray too near the border line of error. It is clear that the defendants had the right to resist absolute danger if such there was. Further, they are favored with the right to oppose the reasonable appearance of such absolute danger. In each of the two instances the law sanctions a homicide absolutely or apparently absolutely necessary to repel the correlative danger. This is substantially what the trial judge told the jury in the instant case and he was right in his language.

Taken altogether, as it must be for the purposes of this opinion, the address of the court to the jury lucidly portrayed the doctrine of actual or apparent danger in terms quite as favorable as the defendants could ask. We are not called upon to dissect the instructions into detached portions, and base our decision solely upon those minute excerpts.

23. It is true as a principle of law that there can be no accessory before the fact in a case of manslaughter by one acting upon a sudden heat of passion. It is equally true, however, that more than one individual may be actuated at one and the same time by a sudden heat of passion caused by a provocation applicable to all of them, apparently sufficient to make the passion irresistible, and so kill another human being as, together, to be guilty of manslaughter.

24. The defendants contend that there is no evidence that Paddock fired a shot, or took any part in the

homicide, and that he is entitled to go free. This entirely ignores the testimony of Santiago and Garcia to the effect that they saw him fire a pistol in the direction of McKendree immediately after the shot by the rifle from the tent. It lays aside the testimony to the effect that, of the two wounds on the body of McKendree, one entered from the front and was caused by a soft-nosed bullet, which ruptured the blood vessels near the heart, broke the fifth and sixth ribs in the back, and lodged in the dorsal muscles; and another entered from the back and caused a clean-cut wound, which penetrated through the entire body, indicating that it was made by a steel-jacketed bullet, such as was found in the Luger pistol, in custody of the defendants. From the testimony the jury properly may have believed that fired by a sudden heat of passion at McKendree's abuse of them, repeated at short intervals, as they say it was, the defendants, acting together, both shot him, one with the rifle and the other with the Luger pistol.

25, 26. It was not error, harmful to the defendants, at least, for the court to direct the attention of the jury to the principle that homicide is justifiable when committed "to prevent the commission of a felony on the property of such person, or upon property in his possession, or upon or in any dwelling-house where such person may be." There was testimony to the effect that Holbrook fired the fatal shot from one of the defendant's tents. He claimed to have fired it to protect himself from a threatened assault by McKendree with his rifle, testifying that the defendants were living in that tent, at least temporarily. They ate and slept there while in charge of their flock, and they would have a right to defend that habitation under the statute from which the excerpt was taken,

whether it was a mere tent or a more pretentious abode. In *Hooper v. State* (Tex. Cr. App.), 105 S. W. 816, the court held that a tent was a private residence within the meaning of a statute against gambling "not in a private residence"; the fact being that the game was played in a tent owned by a saloon-keeper and occupied by an employee as a sleeping place. *Hipp v. State*, 45 Tex. Cr. Rep. 200 (75 S. W. 28, 62 L. R. A. 973), was another gambling case, apparently under the same statute. The card-playing was done in a tent formed by a wagon sheet over a pole, with brush for the sides and back and a brush fence in front to keep out the stock. One Scoggins and his son occupied this tent as a home, doing their cooking and sleeping there, and the court said:

"In our opinion, under the testimony the camp occupied by Scoggins and his son was their private residence; * * it was their home for the time being, and, under this evidence we are of opinion this was * * sufficient to show that this was a private residence."

In *Corey v. Schuster*, 42 Neb. 269 (62 N. W. 470), the question was about the occupation of realty as a homestead, and the opinion there held:

"The law does not contemplate, by the words 'dwelling-house' any particular kind of house. It may be a 'brownstone front,' all of which is occupied for residence purposes, or it may be a building, part of which is used for banking or business purposes, or it may be a tent of cloth."

See, also, *Killman v. State*, 2 Tex. App. 222 (28 Am. Rep. 432). In the light of the testimony, the defendants might well have contended that they killed the decedent to prevent the commission of a felony in their dwelling-house. In any event, the instruc-

tion could not have been harmful to them, because it provided for them another avenue of escape from the charge in the indictment.

From a careful and exhaustive examination of the record, having in mind the consequences that must be visited upon the defendants by a denial of their appeal, we are compelled to the conclusion that the case was fairly presented to the jury, without prejudice to any of their rights. By the resulting verdict of their countrymen, they have been declared guilty of the killing of a human being, and there is no alternative but to affirm the judgment.

AFFIRMED. REHEARING DENIED.

Mr. Justice BENSON did not participate in the hearing or decision of this case.

BENNETT, J., Dissenting.—I cannot quite agree with what is said in the opinion of Mr. Justice BURNETT as to the evidence of previous statements made by the witness Santiago, tending to show intense hostile feeling upon his part towards the defendants, which was offered for the purpose of impeachment.

As I read the opinion, there is no question made but what this evidence was admissible on behalf of defendant, for the purpose of discrediting the witness, if the attorney for the defendants properly stated the purpose for which it was offered. That it was so admissible for the purpose of discrediting the testimony of the witness is so well settled and so elementary as to be beyond question.

But, when this evidence was offered the attorney for defendant, in answer to an interrogatory by the court, stated that it was offered for the purpose of

"impeachment," and it is held in the opinion that the proper purpose of the testimony was to "discredit" rather than "impeach," and that therefore the statement that it was offered as an impeaching question was misleading to the court, and that there was no error in holding that it was inadmissible for that purpose.

I cannot see any difference upon which this distinction can be based. The very purpose of any impeachment is to discredit, and anything which discredits a witness, impeaches him to that extent. In other words, the terms "impeach" and "discredit," as we apply them to the evidence of a witness, mean, as it seems to me, exactly the same thing.

Webster's International Dictionary defines "impeach" in this sense as follows:

"To impute some fault or defect to, as bias, invalidity etc.; to bring or throw discredit on—to call in question—as to impeach one's motives or conduct. To challenge or discredit the credibility of, as a witness"—

and gives "discredit" as one of its synonyms.

Professor Wigmore, in his analytical and exhaustive work on Evidence, in the chapter on "Testimonial Impeachment," treats the proof of bias at considerable length, as one means of impeaching a witness. In one place in this chapter on "Impeachment," he says:

"But the force of a hostile emotion, as influencing the probability of truth telling, is still recognized as important, and a partiality of mind is therefore always relevant, as discrediting the witness. * * We infer partiality from the circumstance that the witness * * has on some occasion expressed hostility to the opponent": 2 Wigmore, § 940.

And in another place in the same chapter:

“On the principle of fairness and of the avoidance of surprise, the settled rule obtains in offering evidence of prior self-contradictory statements that the witness must first be asked while on the stand whether he made the statements which it is intended to prove against him. Does the same rule apply to the use of evidence of former statements of the witness indicating bias? Must the witness first be asked whether he made them? He must as a matter of principle. For the same reasons of fairness, that require a witness to be given an opportunity of denying or explaining away a supposed self contradictory utterance, require him also to have a similar opportunity to deny or explain away a supposed utterance indicating bias”: 2 Wigmore, § 953.

And in the very opening words of the chapter he says:

“The process of *impeachment* or discrediting is fundamentally one of circumstantial relevancy. What is the process? The inference is (for example) that, because the witness X is of an untrustworthy disposition, therefore he is probably not telling the truth on the stand * * or because he has hostile feelings towards the opponent, therefore he is probably not telling the truth.”

Our own Reports are full of illustrations where hostile statements showing bias have been recognized as one method of impeachment. In *State v. Stewart*, 11 Or. 52 (4 Pac. 128), there was an objection to proof of hostile statements by a witness. The court said:

“The argument is that the same strictness of rule is not observed * * in showing hostile declarations of a witness for the purpose of affecting the value of his testimony, as in admitting contradictory statements *for the same purpose*. *The object of the proof is the same*, and the same reason exists to refresh

his memory with the particular facts, and afford him an opportunity for explanation."

And then quoting with approval from another case (*Baker v. Joseph*, 116 Cal. 178):

"No mode of ascertaining the state of feelings of the witness exists, except that disclosed by the declarations or the acts of the witness *sought to be impeached* by these declarations."

Again, in *State v. Mackey*, 12 Or. 154 (6 Pac. 648), the court said:

"There is no distinction, so far as the rule is concerned, between admitting declarations of hostility of a witness for the purpose of affecting the value of his testimony, and admitting contradictory statements for *the same purpose*."

Again, in *State v. Ellsworth*, 30 Or. 145 (47 Pac. 199), it is said:

"It is difficult to see on what ground this evidence was excluded, as it is perfectly well settled that on cross-examination a witness may be interrogated as to any circumstance which tends to *impeach his credibility*, by showing that he is biased against the party conducting the cross-examination."

It seems to me that, under all the authorities, evidence of hostile declarations is only a method of impeachment, and that the purpose of the questions was accurately and properly presented to the court, when the statement was made that the evidence was offered for an impeaching purpose. So far as my personal observation goes, it has been the universal practice of the bar, ever since the decision in *State v. Stewart*, more than thirty-five years ago, to treat evidence of hostile declarations, as impeaching evidence, and to so state its purpose to the court when offered.

It is true that Sections 863 and 864 of the Code, which provide for certain methods of impeachment, do not specifically refer to hostile statements, such as are in question here; but it does not seem to me that these sections can be construed as definitive of the word "impeachment" or intended to narrow its accepted meaning. These sections do not purport to exclude any other methods of impeachment than the ones legislated about (except impeachment by proof of particular wrongful acts). Our courts have never given them any such construction, but, on the contrary, as we have already seen, have held repeatedly that the credibility of a witness can be attacked in other ways not mentioned by the statute. In this case the attorney for defendant did not say that he offered the evidence *under the statute*, but his offer was as broad as the definition of "impeachment," and included any method of impeachment known to the common law. The court could not possibly have been misled, for the proof offered did not tend in the slightest degree to establish any other impeachment, except that of personal hostility.

In this case I am not clear that an error in excluding this evidence would be sufficiently serious to justify a reversal under the circumstances. It must have been entirely plain to the jury, by other evidence which was in the case, that this particular witness was hostile to defendants, and a strong partisan of deceased, in whose employ he was. It is not likely that the admission of his prior declarations would have made the least difference in the result. The ruling does not seem to have been considered of great importance by the defendant, and is hardly referred to in the brief on his behalf.

I do think, however, we should not disturb the long-settled rule that questions of this kind are impeaching questions, and can be so treated by the parties and their attorneys, and should be so regarded by the court.

Rehearing denied October 5, 1920.

PETITION FOR REHEARING.

(192 Pac. 640.)

The defendants, William Holbrook and J. E. Paddock, were jointly charged with murder in the second degree for the killing of O. T. McKendree. They did not ask for separate trials, but appeared together and by the same attorneys, and were tried together. The jury found both defendants guilty of manslaughter. The defendants appealed to this court, and here, as in the Circuit Court, the defendants joined hands, for they not only appeared by the same attorneys, but they united by filing a single opening brief and a single reply brief.

The printed abstract filed by the defendants contained more than thirty assignments of error. The defendants did not in their two printed briefs discuss or even mention all the assignments of error. After hearing the appeal, this court, speaking through Mr. Justice BURNETT, rendered an opinion affirming the judgment of the Circuit Court (188 Pac. 947). In that opinion every assignment of error presented by the defendants in the two printed briefs, jointly filed by them, was examined and decided.

The defendants have petitioned for a rehearing; but they have done so through different attorneys and by filing separate petitions. In the petition of

William Holbrook six grounds for a rehearing are assigned as follows:

(1) "Permitting the character witnesses of the plaintiff to testify to a specific crime that the witnesses heard defendant Holbrook had committed"; (2) "permitting the state to ask the witness Harry Bailey, who was called by defendants, to testify as to the reputation of the defendant, Wm. Holbrook, for being a peaceable citizen, 'if the defendant Holbrook had not been accused of stealing sheep from Mr. S. B. Chandler'; (3) "permitting plaintiff to give testimony as to the reputation of deceased, for being a peaceable citizen"; (4) refusing to permit Letcher Holbrook "to testify concerning the conversation with the witness Santiago"; (5) refusing to permit the defendants to offer testimony concerning the conversation said to have been had between Santiago and H. C. Lemler on April 17th; and (6) refusal to direct a verdict of not guilty.

The petition filed in behalf of J. E. Paddock enumerates four grounds for a rehearing:

(1) Refusal to sustain a motion directing a verdict of not guilty; (2) refusal to give an instruction upon the subject of circumstantial evidence; (3) permitting evidence of experiments; (4) refusal to permit evidence of the conversation said to have occurred on April 17th between Lemler and Santiago.

In their petitions for a rehearing, the defendants occupy common ground, so far as concerns the question of the admissibility of the statements made by Santiago to Lemler; and, although the contentions made by one defendant do not in any respect conflict with those made by the other, still it will be observed that, with the exception of the statements claimed to have been made by Santiago to Lemler, the petition of one defendant presents questions different from those presented by the petition of the other. The

petition of Holbrook presents and discusses questions which are not even referred to in the two original briefs filed by the defendants. None of the points raised by Holbrook were discussed or even mentioned in the original briefs filed by the defendants, except the point involving the conversation with Lemler and the motion for a directed verdict. The petition submitted in behalf of Paddock presents additional arguments in support of the questions discussed in his petition, although the same questions were presented and discussed at the original hearing.

AFFIRMED. REHEARING DENIED.

Messrs. Renner & Chastain, Mr. G. A. Will, Mr. Myron E. Pogue and Messrs. Weatherford & Wyatt for the petitions.

Mr. W. M. Duncan, District Attorney, Mr. W. S. Wiley, Deputy District Attorney, Mr. Thomas Drake and Mr. W. Lair Thompson, contra.

HARRIS, J.—It is difficult to convey a clear understanding of the different phases of the several questions raised by the petitions for a rehearing, unless a somewhat extended account is given of the evidence found in the record. Dry Prairie is a plateau located about thirty-two miles from Klamath Falls; it is about five miles north and south and about four miles east and west. The plateau, particularly on the east side, is bordered by an irregular line of hills, upon which are growing trees. The homicide occurred on Saturday, April 20, 1918, at what is referred to in the record as the Holbrook camp. This camp consisted of two tents, which had been set up about one half a mile from the east side of the plateau. As we read the record, the Holbrook camp was located north of a

line drawn east and west through the center of Dry Prairie, although one witness seems to think that the camp was located near the center of the east side of the prairie. One of the Holbrook tents at the Holbrook camp was ten by ten feet in size, while the dimensions of the other were ten by twelve feet. Both tents opened towards the east. The tents were about six feet apart; the larger one standing south of the smaller tent.

Along the east side of Dry Prairie, but south and a little east of the Holbrook camp, are three buildings. One building was one half of a mile distant from the Holbrook camp; the second or middle building was about three fourths of a mile from the Holbrook camp; while the third was about a mile south of the middle building. The building nearest the Holbrook camp is referred to in the record as the Mrs. Paddock homestead; the middle building, as the Paddock homestead; and the third, as the Davis or Paddock ranch house. On the day of the homicide at a point north 35° 25' east, 1,900 feet from the Holbrook camp stood a tent, known in the record as the McKendree camp. Near the northwest corner of Dry Prairie, and between two and three miles from the Holbrook camp, were some corrals, which are known in the record as the shearing corrals.

About eight years prior to the homicide a post and wire fence had been constructed along a line running east and west for a distance of nearly a mile. A similar fence had also been constructed running north and south for a distance of more than a mile. Succeeding frosts had caused many of the posts to be drawn from the ground, with the result that a considerable portion of the fence was lying upon the ground, and in many places where the posts remained

standing the wires had been severed. The fence line which runs north and south is west of the site of the Holbrook camp, while the fence line extending east and west runs between the McKendree and Holbrook camps, and hence this line is north of the Holbrook camp and south of the McKendree camp. These two fence lines corner at a point which is 2,200 feet northwest from the Holbrook camp. The fence line which extends east and west is, at the point which is directly north of and nearest to the Holbrook camp, about 600 feet distant from that camp.

East of the Holbrook camp, and about 2,550 feet from it, was a spring. In front of and about twenty-five feet from the larger of the two Holbrook tents stood a wagon, over all or most of which had been thrown a wagon cover.

J. E. Paddock owned or controlled several hundred acres of deeded land along the east side of Dry Prairie. This deeded land included the three buildings already mentioned. Paddock had made an application for additional acreage under the act "to provide for stock-raising homesteads and for other purposes." This additional acreage so applied for was north of and adjacent to the deeded lands. We infer from the record that the remainder of Dry Prairie was government land. The Holbrook camp was located on the tract which had been applied for by Paddock. The McKendree camp was located on the public domain.

Letcher Holbrook owned a band of 2,500 sheep, and his brother William Holbrook had a contract under the terms of which the latter was entitled to a certain portion of the wool and increase. On April 12, 1918, Letcher Holbrook, with the approval of William Holbrook, leased the Paddock lands "for the lambing

season, thirty or forty days"; and at the same time Letcher Holbrook employed Paddock to help with the sheep during the lambing season. The Holbrook sheep were at Antelope Springs, about fifteen miles distant from Dry Prairie. On the morning of Saturday, April 13th, the sheep were started for Dry Prairie. On Monday morning, April 15th, the Holbrook sheep were driven by Letcher Holbrook and William Holbrook and their herders into the southeast corner of Dry Prairie near the ranch house.

The decedent, McKendree, owned a band of about 2,300 sheep, which had been driven into Dry Prairie for the lambing season. Jim Santiago, a Spaniard, was in charge of the McKendree sheep. The state claims that the McKendree sheep reached Dry Prairie between the 10th and 12th of April, while the evidence offered by the defendants is to the effect that none of the McKendree sheep were seen anywhere on Dry Prairie until Monday, April 15th, after the Holbrook sheep had been driven into the southeast corner of the prairie.

The defendants claim that on Monday, April 15th, after the Holbrook sheep had entered Dry Prairie, and while they were being driven north toward the Paddock homestead, a band of about 800 of the McKendree sheep was driven fast from the southwest corner of the prairie towards the Paddock homestead, apparently for the purpose of intercepting the Holbrook sheep. The witnesses for the defendants say that, in order to prevent the McKendree and Holbrook sheep from mixing, the Holbrook sheep were stopped and herded back on the hillside. On Tuesday the Holbrooks attempted to drive their sheep north, when again they encountered the McKendree sheep, and again the Holbrook sheep were herded

back. Paddock had agreed with Letcher Holbrook to be at Dry Prairie on Monday, but he was unable to reach there until Tuesday afternoon, April 16th. Paddock says that when he rode into the prairie he found the McKendree sheep in front of the Paddock homestead, and that he informed the McKendree herders that he owned the land there, and directed the herders to drive the sheep off, and that upon the refusal of the herders to comply with his request he himself drove the McKendree sheep away from the homestead. Paddock says that he later met Santiago, and that, when he requested Santiago to move the sheep, the Spaniard claimed that McKendree had leased the land. Paddock says that he then told Santiago that he owned the land and had leased it to the Holbrooks, whereupon Santiago stated that he would move the next day. Santiago had pitched his tent in front of the Mrs. Paddock homestead. Paddock claims that he pointed out to Santiago the lands claimed by him, and that he suggested that Santiago keep his sheep on the west side of the prairie, and move his camp to the corrals, where there was a good spring, so that the prairie could be divided between the McKendree and the Holbrook sheep. On Wednesday, April 17th, the McKendree tent was moved from in front of the Mrs. Paddock homestead to the place designated as the McKendree camp; and on the same day the smaller of the Holbrook tents was moved from a place south of the Paddock homestead, where the Holbrooks had camped Tuesday night, to the place designated as the Holbrook camp. The larger of the Holbrook tents was moved and set up at the Holbrook camp on Thursday. The Holbrook sheep were driven north on Wednesday, and thenceforth were herded along the east side of Dry Prairie. As

we read the record, the McKendree sheep were herded along the west side of Dry Prairie after the McKendree tent had been moved from the Mrs. Pad-dock homestead. In other words, the McKendree sheep were herded along the west side of the prairie, while the McKendree camp was maintained on the east side, and the Holbrook sheep were herded and the Holbrook camp was maintained on the east side of the prairie.

At this point in the narrative it may be helpful to describe the route pursued by McKendree. At some time after the first appearance of Holbrook at the southeast corner of Dry Prairie, Santiago notified McKendree by telephone of the conditions existing at Dry Prairie. On Friday, April 19th, McKendree left Klamath Falls and stayed overnight at the home of a relative, not far from Dry Prairie. The next morning, Saturday, April 20th, McKendree rode on horseback into Dry Prairie, and first went to the McKendree camp, where he found Manuel Garcia, the camp-tender, and from that point he rode directly to the Holbrook camp.

The evidence is not clear as to the exact time when McKendree first appeared at the Holbrook camp, but it is approximately correct to say that it was between 8 and 9 o'clock A. M., and probably nearer 8 than 9 o'clock. When McKendree left the Holbrook camp, he rode in a northwest direction towards a point about one half of a mile south of the corrals, where he met Santiago. McKendree, accompanied by Santiago, the former on horseback and the latter afoot, then retraced his steps, going in an easterly direction towards the two camps. When McKendree and Santiago reached the fence line which runs east and west, they continued east along and near the fence

line, until they reached a point about north of the Holbrook camp, and there they separated; McKendree riding to the Holbrook camp, and Santiago walking towards the McKendree camp. There is a conflict in the evidence as to whether Santiago reached the McKendree camp before or after the moment of the homicide. The record does not disclose the exact period of time which elapsed between McKendree's first and second appearance at the Holbrook camp; but it was probably not less than one half an hour, nor much more than an hour. One witness says that the shots were fired at about 9:30 o'clock A. M. McKendree had a rifle with him when he left Klamath Falls, and he carried this rifle with him from the time he first appeared on the prairie until the homicide. Santiago also carried a rifle when he accompanied McKendree from the point south of the corrals.

The contention made by the defendants as to what occurred when McKendree was at the Holbrook camp the first time is best explained by quoting at length from the testimony of Paddock:

"Mr. McKendree rode up, passed the time of day, and says, 'It appears to me you have got my sheep cut off from camp.' I says, 'No, Mr. McKendree; you have camped in back of your sheep.' I says, 'I asked the camp-tender to put his camp over to the shearing-pens (corrals) when he moved it, before he established it up there.' He asked me then where Letcher Holbrook was; I said, 'Letcher is gone over to the west side to look after some ewes and lambs,' and that Will was in camp. 'Will!'—he called Will, and Will came out, and McKendree says, 'You are going to get 600 bucks into this herd of sheep in the morning, and you will have to herd them.' Will says, 'I am a pretty good herder; I can herd them,' Will says, 'I have good men and good dogs, I can herd them,' and Will says, 'I have got an awfully good dog, and

myself and the dog can herd most any band of bucks.' McKendree says, 'You damn son-of-a-bitch, you can't turn any dogs into my bucks,' and he jumped off his horse, and, when he jumped off his horse, I started to get away, and so did Will. Well, I had turned around with my back to him, and he says, 'Come back here, you damn son-of-a-bitch, or I will blow your map off.' That scared me; I looked around, and he had his gun to his shoulder and right on to us. I walked—I hesitated a little bit; he said, 'Get up on this knoll.' I got up on the knoll; I stayed there; he called us vile names. * * He called us damn son-of-a-bitches; just about that time his horse broke away, started to run off, and he says, 'There, I have lost my horse'; he started for it; he followed the horse over to—the horse had stopped at the creek; he caught the horse, and got on the horse, and rode back past the camp, a little to the north, and as he passed the camp he hollered at me, he says, 'If I ever catch either of you damn sons-of-bitches out alone, I will beat you until your mothers won't know you.' I says, 'Mr. McKendree, don't come back here and bother us any more'; so he went on. He went out to the fence on the north and west of the camp, and he headed west; I didn't pay any attention to him any more; didn't see where he went."

The defendants were the only persons at the Holbrook camp when McKendree first rode up to the tents; nor was there any other person, besides these three, at the Holbrook camp at any subsequent time until after the homicide.

Barclay Holbrook, a cousin of William and Letcher Holbrook, and Dan Blodgett, were herding a portion of the Holbrook sheep. There is a sharp dispute between the state and the defendants as to the exact whereabouts of these two herders, particularly at the time when the homicide occurred. The state claims that Barclay Holbrook and Blodgett were

west of the Holbrook camp at a place where they could not see what occurred in or near the Holbrook tents, while defendants contend that these two herders were about a half a mile from the Holbrook camp at a point a little north and east of the fence corner at a place where they could see whatever happened in front of the Holbrook camp. After McKendree left, and had gone to the place where Santiago was, south of the corrals, William Holbrook left his camp, and went to Barclay Holbrook, and inquired concerning the whereabouts of Letcher Holbrook, who had previously gone out west of the camp to look after some ewes and lambs. At about that time McKendree and Santiago were discerned coming toward the east. William Holbrook says that he thought the person afoot was Letcher Holbrook, and that because he so believed he returned to his camp. The undisputed evidence is that William Holbrook carried a rifle with him when he left camp to inquire about his brother.

McKendree was shot twice. The theory of the defendants is that both shots were fired by William Holbrook in self-defense, and that Paddock was a mere bystander, taking no part in the killing. An extended excerpt from the testimony of Paddock adequately expresses the position of the defendants. Paddock testified that, when McKendree rode up to the camp the second time, McKendree said to the defendants:

“There isn’t room in this prairie here for two bands of sheep; you fellows will have to move.”

Continuing, Paddock testified as follows:

“Well, I says, ‘Mr. McKendree’; I says, ‘Edler and I used to lamb two bands of sheep; we never had any trouble; we had plenty of room; I don’t

see as there is any reason why we can't lamb two bands here.' Well, he says, 'You don't own this land in here.' Well, I says, 'Maybe I don't own it, but I have got a fling on it, and I have got a little better right on it than you have'; and he says, 'I don't care how much land you got,' he says, 'There isn't room enough here to lamb two bands of sheep, and I am going to put some bucks in here in the morning, and you will have to herd them'; and he says, 'Where is Will?' I says, 'Will is in camp, in the tent'; so he called, 'Will!' Will came out, and, when he came out, McKendree says, 'Will, you are going to get 600 bucks in here in the morning; you will have to get these sheep off the flat; I am going to have this flat; you will have to move them,' or, 'Will, you will have to herd those bucks.' He started to ride on to me, crowding me back. Will says, 'I am not going to move these sheep off of the flat; I have rented this land; I am going to stay right here'; and McKendree kept coming towards me; he had gotten up to me close, crowding me back, and I don't remember just [what] words were said in there by Will, but McKendree says, 'I will'—McKendree says, —'I will blow your map off,' and he dropped his rein, and started to raise his gun, and I grabbed at the horse; well, just at that time, why, the gun cracked over behind me, and the horse whirled to the left, and the second shot fired, and McKendree reeled, and the horse plunged off of that mound, and the horse—and the body went off in this manner [indicating], turned over and fell flat on its back on to the ground, and just at that time, a shot rang out from the McKendree tent."

When Paddock was asked to state how far McKendree crowded him back, he answered: "Eight or ten feet." As will be observed from the testimony of Paddock, the defendants contend that a shot was fired from the McKendree camp. Barclay Holbrook says that he heard four shots; two from the Hol-

brook camp, and two from the McKendree camp. Blodgett testified that he heard three shots; two from the Holbrook camp, and one from the McKendree camp. Barclay Holbrook and Blodgett gave testimony which, if believed, tended to corroborate the stories told by the defendants.

The theory of the state is that the homicide was in reality murder. There is evidence in the record upon which the state contended that, after McKendree met Santiago, they decided to take the McKendree sheep to a place about eight miles from Dry Prairie; that when McKendree and Santiago returned towards the camps their purpose was to get Santiago's horse, so that they could ride together to the place where it was intended to take the McKendree sheep; that when Santiago and McKendree separated at a point near the fence line north of the Holbrook camp, McKendree went to the Holbrook camp to request the defendants to move their sheep a sufficient distance to enable McKendree to get his sheep out of the prairie without mixing; that Santiago, immediately after separating from McKendree, called to Garcia, who was then at the McKendree camp, to get Santiago's horse which was at the spring east of the Holbrook camp. Santiago testified that he was watching McKendree and the Holbrook camp as he proceeded towards the McKendree camp, and that the shooting occurred when he was about halfway between the two camps, but a little nearer the McKendree camp than to the Holbrook camp. Garcia said that immediately after hearing Santiago's call to get the horse, he proceeded towards the spring where the horse was, and that as he walked south towards the spring he watched the

Holbrook camp, and that the shooting took place when he was at the spring.

It is admitted that, from the time McKendree rode up to the camp on the second occasion until the shooting, Paddock was outside and in front of the tents. The defendant Holbrook was inside the larger tent when McKendree rode up. But Holbrook says that he came out of the tent afterwards, although he re-entered the tent to get his rifle; and there is evidence upon which the state contends that the rifle was fired, either while Holbrook was inside the larger tent, or else while standing in the opening of the tent. Santiago says that, when McKendree rode up to the Holbrook camp, he (McKendree) sat on the horse for a moment talking with the man dressed in khaki (admitted to have been Paddock), and then "got down from his horse" and "stood there talking a little while"; that McKendree took off his coat and attached it to his saddle; that, after talking about ten minutes, McKendree got on his horse as though he would come back, and that "at the moment that the horse turned around there was a shot," which came from the Holbrook tent; that the horse started to run, and as the horse was running there was "another shot fired with a pistol" by the man in khaki. The account given by Garcia of what happened is much like the story told by Santiago. Garcia stated:

"I saw the man with yellow trousers (Paddock) lift his arm and shoot a shot."

It is conceded that two rifle shells were found about two feet in front of the larger tent. In addition to the rifle shells, a Luger pistol shell was found a few feet beyond the rifle shells. A Luger pistol was found in the wagon seat under the wagon

cover. In addition to the direct testimony of Santiago and Garcia that they saw Paddock shoot McKendree, there was evidence about the difference between the sound made by the first and second shots, the course taken by the two bullets which struck McKendree, and many other details, from all of which the state argued that McKendree was shot once by a rifle and once by the Luger.

There was evidence from which the state argued that the defendants had moved McKendree's body for the purpose of making evidence for themselves. While riding along the line of the fence about "10" or "11" o'clock A. M., and probably within an hour after the homicide, Walter Buckmaster was hailed by someone at the Holbrook camp. Buckmaster testified that, upon riding up to the camp Paddock, when referring to McKendree's body, said: "We won't say who killed him."

One witness testified that, several weeks previous to the homicide, certain persons in the presence of Paddock were discussing "the range question, and someone said to Paddock, 'Wait until McKendree goes up there [meaning Dry Prairie]; he will feed your range'"; and Paddock answered by saying, "If the son-of-a-bitch comes up there, he will get what's coming to him."

It is stated by all the witnesses, including the two defendants, who saw McKendree at the Holbrook camp, that at the first shot McKendree's horse turned and ran towards the McKendree camp. It was said by Santiago and Garcia that McKendree's horse stood near the tents for a time, and it is admitted by the defendants that the horse was standing there several minutes. Santiago and Garcia say that McKendree turned his horse as though to come to

the McKendree camp, and that the first shot was fired while the horse was in the act of turning. The defendants say that McKendree rode his horse towards Paddock, and crowded Paddock back eight or ten feet. There is evidence from which the state contended that there were tracks showing that a horse had been standing at a place which was sixteen paces from the front of the larger tent, and sixteen paces almost due south from the place where the officers found McKendree's body. There was evidence from which the state could have argued that the horse's hind feet were still at the place where the horse had been standing when the first jump was made to run.

Walter Buckmaster described the place and position of the body as he saw it when he was at the camp in the morning. Witnesses who arrived on the scene late in the afternoon found the body in a different place from that described by Buckmaster, and in a position different from that described by him. When the officers arrived in the afternoon, the rifle lay against the left side of McKendree's body, with the butt of the rifle on the ground and the muzzle elevated above the body. There was blood and sand on the rifle and the state claims that the blood and sand had been "smeared" on it. McKendree wore gloves on both hands. There was evidence to the effect that there was no blood on either glove. There is evidence to the effect that McKendree could not have done a single conscious act after he was shot. The state claims that the evidence shows that there was no blood on the outside of the clothing against which the rifle lay, and that the blood found on the rifle could not have gotten there by coming in contact with the clothing.

The blood on the rifle was still damp, according to the testimony of one witness, as late as about 5 o'clock P. M., notwithstanding, according to one witness, there was sunshine that day, and another witness testified that it had been blowing considerably. The defendants would not permit any person to approach near the body until the arrival of the officers. No footprints could be found within twenty feet of the body, although the ground around the body was examined for footprints.

27-29. In the brief filed in support of Paddock's petition for a rehearing, it is argued at length that there was no evidence at all showing that Paddock was more than a mere bystander; that there was no evidence to show that Paddock aided or abetted Holbrook; and that, therefore, the jury should have been directed to return a verdict acquitting Paddock. It is not the province of this court to decide whether Paddock is guilty or innocent, for it is the exclusive province of the jury to decide that question. Our duty is to ascertain whether there was sufficient evidence to carry the case to the jury. If the jurors believed the evidence relied upon by the state, then it is clear, from the foregoing extended statement of the record, that there was evidence upon which the jury could have found that the second shot came from the Luger pistol; that the pistol was fired by Paddock; that Paddock aided Holbrook; that the Luger shot contributed to the death of McKendree, although the rifle shot was necessarily fatal; that the killing was not in self-defense; and that Paddock was guilty of at least manslaughter. In this connection it is apropos to say that Section 1897, L. O. L., is not the only section of the Code defining

manslaughter. Section 1902 is an *omnibus* provision, and by its terms:

“Every other killing of a human being by the act, procurement, or culpable negligence of another, when such killing is not murder in the first or second degree, or is not justifiable or excusable as provided in this chapter, shall be deemed manslaughter.”

30, 31. The court properly refused to direct the jury to acquit Holbrook. There was evidence to support the contention made by Holbrook, there was evidence to support the contention made by the state, and consequently it was for the jury to decide, from this conflicting evidence, whether Holbrook was guilty or innocent.

The contention of Paddock that the evidence offered by the state was circumstantial cannot be sustained. Two witnesses, Santiago and Garcia, gave direct testimony that they saw a man, who is admitted to have been Paddock, shoot McKendree. The rule is correctly stated in the original opinion.

32. The evidence concerning experiments was obviously within the rule announced by Mr. Justice BENNETT in *Kohlhagen v. Cardwell*, 93 Or. 610 (184 Pac. 261). A careful perusal of the evidence concerning the removal of the body at once makes it plain that the state was entitled to show, if it could, that the body could have been removed to the place where it lay, when the officers arrived, without leaving footprints. And so, too, the state was entitled to show, if it could, that Barclay Holbrook could not have seen a puff of smoke at the McKendree camp. Barclay Holbrook testified that he heard a third shot and then looked in the direction of the McKendree camp, “and I heard the fourth shot, and puff of smoke.” Experiments were made for the

purpose of ascertaining whether smoke could have been seen, if a shot had been fired from the McKendree camp. These experiments met the requirements of the standard fixed in *Kohlhagen v. Cardwell*, 93 Or. 610 (184 Pac. 261).

33. Letcher Holbrook had a talk with Santiago on Monday, April 15th, near the Paddock homestead, after the Holbrooks encountered the McKendree sheep, which the defendants claim were driven over to the Paddock homestead. The record does not disclose what answer Letcher Holbrook would have given if he had been permitted to testify. The defendant William Holbrook has failed to point out in his brief wherein, if at all, he was injured by reason of the refusal of the court to permit Letcher Holbrook to relate the conversation which he had with Santiago. This objection, made by Holbrook, must be overruled.

34, 35. The state called ten witnesses in rebuttal, who testified, over objections made by defendants, that McKendree's reputation for peaceableness and quietness was good. Holbrook strenuously contends that this testimony was inadmissible, for the reason that the defendants offered no testimony assailing the character of the decedent. In all jurisdictions the rule is that the state cannot as a part of its primary case offer evidence concerning the decedent's reputation for having been a peaceable and quiet person; but the general rule is that, if the accused assails the decedent's character for peaceableness, the state may then in rebuttal offer evidence showing that the decedent's reputation for peace and quiet was good. The precedents do not agree upon what constitutes an assault upon the character of the decedent. In most and nearly all

of the jurisdictions, the mere fact that the defendant offers evidence that the decedent made an attack, and that the defendant acted in self-defense does not justify the admission of evidence for the state that the decedent was reputed to be a peaceable and quiet man. In other words, the plea of self-defense does not alone in most jurisdictions open the door to the state for the introduction of evidence concerning the decedent's reputation for having been a peaceable and quiet citizen: Note in L. R. A. 1916A, 1245; *State v. Potter*, 13 Kan. 414; *Kelly v. People*, 229 Ill. 81 (82 N. E. 198, 11 Ann. Cas. 226, 12 L. R. A. (N. S.) 1169). In at least two jurisdictions, including Oregon, the plea of self-defense, accompanied, of course, with evidence tending to support it, has been treated as a sufficient attack on the character of the decedent for peace and quiet to entitle the state to submit rebuttal evidence of his good reputation for peaceableness: *State v. Wilkins*, 72 Or. 77, 87 (142 Pac. 589); *Dukes v. State*, 11 Ind. 557 (71 Am. Dec. 370); *Fields v. State*, 134 Ind. 46 (32 N. E. 780); *Thrawley v. State*, 153 Ind. 375 (55 N. E. 95). If the question were *res integra*, the writer would take the view that the opinion in *State v. Wilkins* states the rule too broadly. However, the ruling announced in that case had been made before the trial in the instant case, and was the law in this jurisdiction at the time of the trial of the instant case. The holding in *State v. Wilkins* entitled the state to offer in rebuttal evidence of McKendree's good reputation for peaceableness, and therefore no error was committed by the trial court in that respect.

Harry Bailey, who had known William Holbrook for seventeen years, was called as a witness for the defendants, and was asked:

"And do you know what his general reputation is, as being a peaceable, quiet, and law-abiding citizen in that community?"

The witness stated that he did know Holbrook's reputation and that it was good. On cross-examination the following questions were asked and answers given:

"Q. Mr. Bailey, your business hasn't brought you in touch with the sheriff's office, so that you keep track of the offenses committed over there, has it?"

"A. Most of the time, I think.

"Q. You heard of Will Holbrook stealing a bunch of sheep from Mr. S. B. Chandler and was compelled to repay the price of the sheep, didn't you?"

"Mr. Renner: I object, because it is absolutely improper cross-examination.

"Mr. Thompson: Law-abiding citizens don't steal sheep.

"By the Court: I am frank to say that it is the first time I heard it questioned; I will take about a minute to confirm my opinion on that. (Refers to book.) That is the ordinary and common line of cross-examination, and this book seems to support it, and I will have to permit it.

"Mr. Renner: Note an exception.

"A. I may have heard some sort of talk; I don't believe I ever heard anything direct from the sheriff's office.

"Q. You heard it among people over there that this gentleman stole a bunch of sheep from Chandler and Rehart, and the owners compelled him to pay a considerable amount of money to straighten it up, didn't you?"

"A. Well, I am not entirely sure whether I did or not; seems—it occurs to me I have heard some conversation of that kind."

On redirect examination the defendant was asked:

"You say you heard something about a Holbrook who had some difficulty with Chandler, in which he

had been charged with stealing some sheep; you have heard some such rumor as that?

"A. Just street talk.

"Q. Wasn't that man, now, Letcher Holbrook, instead of Will Holbrook?

"A. I couldn't say which one it was at all; might have been."

36-38. The question of the propriety of the cross-examination of Bailey is not listed among the assignments of error as required by the rules governing appeals, and therefore the defendants are not in a position to demand a consideration of the question attempted to be presented. Moreover, if either defendant were in a position to assail the ruling of the trial court, it would be apparent from an inspection of the record that the defendants made the issue when they inquired concerning the reputation of Holbrook for being, not merely a quiet and peaceable citizen, but a law-abiding citizen, also. The general rule is that the evidence must be confined to the trait involved in the crime charged; and under this rule the inquiry is usually confined to evidence of the accused's pacific character, or, as frequently expressed, "his reputation for peace and quiet": 13 R. C. L. 914. In the instant case, stealing, considered as a trait, was nowise involved in the crime charged, and on that account the defendants should have limited their original inquiry to Holbrook's reputation as a peaceable and quiet man, but the defendants did not limit the scope of their inquiry. They extended it, by asking concerning Holbrook's reputation for being a law-abiding citizen. The question as asked was comprehensive and all-inclusive. The defendants made the issue, and the cross-examination was within the issue as made by the

defendants. Furthermore, the redirect examination practically destroyed the whole force of the answer to which the defendants objected.

The grounds upon which Holbrook relies for a rehearing have already been enumerated. The language employed by him in stating the first ground relied upon should be observed. The only assignment of error found in the abstract to which this specified ground for a rehearing is referable reads as follows:

“The court erred in permitting the character witnesses of the plaintiff to testify to a specific crime that the witnesses thought Holbrook had committed, being some trouble concerning the stealing of sheep.”

W. B. Snyder, the sheriff of Lake County, was called as a witness for the state, and on direct examination he stated, without any objection by the defendants, that Holbrook's general reputation “for being a peaceable, law-abiding citizen” was bad. On cross-examination the witness was asked:

“Isn't it a fact that in your testimony here you have in mind a difficulty which arose between the brother of this man, maybe this man also, and Mr. Chandler, the witness just on the stand, in relation to a controversy over some sheep?”

And the witness, after some additional questions, stated that the difficulty referred to was “the only thing” that he had in mind, and that it was “the only thing” that he had heard against Holbrook. Without any objection upon the part of the defendants, the witness stated on redirect examination that the difficulty arose “over trouble over sheep,” and without any objection by the defendants the witness was asked whether the charge involved a violation of law, and he stated that it did.

The defendants did not move to strike out any of the testimony of Snyder. The fact of the difficulty with Chandler was elicited by the defendants, and not by the state. It is true that twice the state asked about the nature of the trouble and each time the defendants objected; but it is also true that neither of the two questions was answered. In this state of the record there is no ground upon which the defendants can complain.

F. P. Light was another witness called by the state. He testified, without any objection by the defendants, that Holbrook's general reputation "for being a peaceable, law-abiding citizen" was bad. On cross-examination the witness was asked:

"Isn't it a fact that all you base—what you say about his reputation, was the difficulty that arose between him and his brother and Chandler about some sheep; isn't that a fact, Mr. Light?"

The witness said that the difficulty with Chandler was "all I know about him," and that the difficulty was "the only thing" upon which he based his judgment as to Holbrook's reputation. The defendants did not move to strike out any of the testimony of the witness Light; nor was there any objection to any part of his testimony concerning Holbrook's reputation.

39. S. B. Chandler was another witness who testified about Holbrook's reputation, and the answer given by him upon cross-examination rather indicated that his testimony about Holbrook's reputation was based largely, if not entirely, upon his difficulty about the sheep. The defendants neither objected to the testimony of Chandler nor moved to strike it out. In this condition of the record the defendants are not in a position to ask for a reversal of the

judgment on account of the testimony of the witnesses Light and Chandler.

After again considering the questions arising out of the refusal of the court to permit the introduction of evidence about the conversation between Santiago and Lemler, the majority of the court reaffirm the reasoning and conclusion of Mr. Justice BURNETT in the original opinion. Mr. Justice BENNETT, however, adheres to the views expressed by him in his specially concurring opinion filed with the original majority opinion. In support of the view of Mr. Justice BENNETT, it may be pointed out that Santiago testified that Paddock and Holbrook chased his sheep from the Paddock homestead; that he (Santiago) got a little mad when Paddock told him to move his sheep; that he talked "considerable number of times" with the defendant Holbrook about the sheep before McKendree arrived; that "I told him I was there first and there wasn't enough land for two"; that he was "a little angry" when he talked with Holbrook; that he had never been over to the Holbrook camp because he "didn't care to go"; and that when he separated from McKendree near the fence, and while proceeding towards the McKendree camp, he looked "toward the Holbrook tent all the time from the time" he left McKendree, "because I thought there was something bad in it. * * I was expecting trouble, because they were fellows that would get after a man to his back and not to his face." There is also evidence in the record from which it could be argued that Santiago objected when McKendree suggested to him to move the sheep, and that McKendree did not permit Santiago to go with him to the Holbrook camp, because he

thought the presence of Santiago might precipitate trouble.

40. When the state filed its printed brief, counsel for the state called attention to the rule, generally followed, that no questions will be noticed upon appeal, except such as are assigned by the appellant, and that all assignments of error not argued by the appellant will be treated as having been waived by the appellant. The rule, to which attention was called by the state, was discussed by the appellants in their reply brief; but the defendants did not, by their reply brief or otherwise, attempt to enlarge the scope of the discussion found in their original brief. However, because of the importance of this proceeding, involving, as it does, the liberties of the defendants, we have disregarded the rule concerning the waiver of assignments of error, and have again examined the whole of the voluminous transcript, and have not only again carefully considered the questions urged by learned and active counsel at the original hearing, but we have also given our most careful consideration to the questions so learnedly and vigorously presented for the first time in the petitions for a rehearing. For the foregoing reasons we come to the conclusion that the verdict of the jury should not be disturbed.

The petitions for a rehearing are therefore denied.

AFFIRMED. REHEARING DENIED.

Second petition for rehearing denied November 16, 1920.

SECOND PETITION FOR REHEARING.

(193 Pac. 434.)

Mr. G. A. Will and *Mr. Myron E. Pogue* on petition for J. E. Paddock.

Mr. W. M. Duncan, District Attorney, *Mr. W. S. Wiley*, Deputy District Attorney, *Mr. Thomas Drake* and *Mr. W. Lair Thompson*, *contra*.

HARRIS, J.—On page 11 of the manuscript of our opinion, filed October 5, 1920, denying the petitions of the defendants William Holbrook and J. E. Paddock for a rehearing (192 Pac. 640), we quoted from the reported testimony of Garcia and said that he stated: "I saw the man with yellow trousers (Paddock) lift his arm and shoot a shot." Paddock has filed a second petition for a rehearing, and, among other things, the writers of the petition say that they "are unable to find any such language in the record of Garcia's testimony." The point sought to be made by the defendant Paddock is that there was no direct evidence against him, and that therefore his substantial rights were materially prejudiced by the refusal of the trial court to instruct the jury on the subject of circumstantial evidence. As we view the record, the case against Paddock was not entirely dependent upon circumstantial evidence, but upon the contrary there was direct testimony given by the two witnesses, Santiago and Garcia; and when in our written opinion, rendered on the petitions for a rehearing, we quoted Garcia as having

said, "I saw the man with yellow trousers (Paddock) lift his arm and shoot a shot," we did so for the purpose of explaining the foundation upon which we rested our conclusion that there was direct testimony against Paddock. If we have erroneously quoted from the record, then of course the foundation upon which our conclusion is based is to that extent weakened. We did not, however, erroneously quote from the record, but the answer ascribed to Garcia is exactly as it is written in the record which the defendants presented to us on this appeal. As shown on page 122 of the transcript of testimony, near the bottom of the page, counsel for the defendants, when cross-examining Garcia, asked the following question: "What did you see when you heard the next shot?" And Garcia answered thus: "I saw the man with yellow trousers lift his arm and shoot a shot." There is no controversy whatever about the identity of the man referred to as "the man with yellow trousers," for it is conceded that Paddock was that man, and for that reason we parenthesized the word "Paddock" when quoting from the record.

Of course, both Santiago and Garcia were too far away from McKendree and Paddock to hear them talking; and although Santiago and Garcia, when describing the actions of McKendree, referred to him as "talking" with Paddock, nevertheless Santiago testified, as shown on page 103 of the transcript of testimony, that he did not hear anything that was said, and Garcia likewise testified, as appears on page 121 of the transcript of testimony, that he did not hear what was said. Our conclusion that there was direct evidence, as distinguished from circumstantial evidence, tending to show that Paddock shot McKendree, did not involve the assumption that

either Santiago or Garcia could hear what may have been said by anyone at the Holbrook camp. But Santiago and Garcia told about what they saw, and in our judgment their testimony included direct evidence against Paddock. The fact that Santiago and Garcia were a considerable distance from the Holbrook camp when the shooting occurred does not of itself make their evidence circumstantial. This feature might have been appropriately considered by the triers of the facts when weighing the testimony of these two witnesses; but the court cannot as a matter of law say that the distance from which Santiago and Garcia saw the shooting of itself rendered their testimony circumstantial in character.

Aside from the question of the accuracy of the testimony ascribed to Garcia, the second petition for a rehearing filed by Paddock involves no new questions and presents no new arguments. With a full understanding of the responsibilities assumed by those upon whom rests the duty of final decision, we have given to the questions involved in this appeal our most careful consideration and best thought and judgment; but after doing so we are unable to agree with the contentions which counsel for the defendants have so earnestly, sincerely, and zealously presented. We have now neither the duty nor the right to decide the facts, for that duty rested upon and has been performed by the jury. We have announced and applied the law as we understand it; and, as we view the record, the defendants were tried by a jury according to the laws of the land.

The result, then, is that the petition must be denied.

AFFIRMED. REHEARING DENIED.

Argued at Pendleton October 26, affirmed November 16, 1920.

STATE v. GATES.

(193 Pac. 197.)

Criminal Law—Motion in Arrest, Filed Two Days After Verdict, but Before Entry of Judgment, is in Time.

1. Under Sections 175, 1559, 1560, L. O. L., prescribing the time for filing motions for new trial, and requiring a motion in arrest to be filed within the same time, a motion in arrest, filed two days after verdict, but before entry of judgment, is in time.

Infants—Indictment Insufficient to Charge Offense of Contributing to Delinquency of Minor.

2. An indictment, charging that defendant did wrongfully contribute to the delinquency of a minor female child, and induced her to have unlawful sexual intercourse with him, she not then and there being his wife, is insufficient where it did not allege that the minor, who was averred to be over the age of 16, was unmarried, for a female minor of the age of 15 or over, if married, cannot be a delinquent child, and the fact that such minor is not married must affirmatively appear.

From Union: JOHN W. KNOWLES, Judge.

In Banc.

The defendant was tried and convicted, by the verdict of a jury, of the crime of "contributing to the delinquency of a minor." The verdict of the jury was returned into court on June 24, 1920, and thereafter, on June 26, 1920, and prior to judgment on the verdict, the defendant filed his motion in arrest of judgment on the ground that the indictment does not state facts sufficient to constitute a crime. Having taken the matter under advisement, the court, on August 14, 1920, made and entered an order allowing the motion in arrest of judgment, and the state appeals **AFFIRMED.**

For the State there was a brief and an oral argument by *Mr. John S. Hodgin*, District Attorney.

For respondent there was a brief and an oral argument by *Mr. R. J. Green*.

BENSON, J.—The state assigns two grounds of error: (1) That the motion was not filed within the time prescribed by statute; and (2) that the indictment sufficiently states the facts constituting the crime charged.

1. Considering these in the order mentioned, was the motion filed within the time prescribed in the statute? Section 1559, L. O. L., says:

“Chapters VII and VIII of Title II of the Code of Civil Procedure shall apply to and regulate exceptions and new trials in criminal actions, except that a new trial shall not be granted on the application of the state.”

Section 175, L. O. L., being a part of Title II, Chapter VIII, of the Code of Civil Procedure, contains this clause:

“A motion to set aside a judgment and for a new trial, with the affidavits, if any, in support thereof, shall be filed within one day after the entry of the judgment sought to be set aside, or such further time as the court may allow.”

Section 1560, L. O. L., being a part of the Code of Criminal Procedure, reads thus:

“A motion in arrest of judgment is an application on the part of the defendant that no judgment be rendered on a plea or verdict of guilty, or on a verdict against the defendant on the plea of a former conviction or acquittal. * * The motion must be made within the time allowed to file a motion for a new trial, and both such motions may be made together, and heard and decided at once or separately, as the court may direct.”

From the foregoing statutory provisions it is apparent that a motion for a new trial may be filed either before or after the entry of judgment, but in any event must be made not later than one day after the entry of judgment. In the present case, the motion in arrest of judgment was made before any entry of judgment, and was therefore clearly within the time allowed for filing a motion for a new trial.

2. We turn, then, to a consideration of the sufficiency of the indictment. The charging part of the indictment reads as follows:

"The said Price Gates on the 2nd day of May, 1920, in the County of Union and State of Oregon, then and there being, did unlawfully and wrongfully encourage, cause and contribute to the delinquency of one Marjorie McIntire, a minor female child under the age of eighteen years, to-wit, of the age of sixteen years, and follow a course of conduct which would cause, and did manifestly tend to cause, the said Marjorie McIntire to become delinquent, by acts and in manner following:

"At the said time and in said county the said Price Gates persuaded, induced and caused the said Marjorie McIntire to sleep with him and to have unlawful sexual intercourse with him; the said Marjorie McIntire not being then and there the wife of the said Price Gates, all contrary to the statutes in such cases made and provided and against the peace and dignity of the State of Oregon."

The motion of defendant is based upon the fact that the indictment fails to allege that the "minor female child" was then and there single and unmarried. Counsel for the state contends that such an allegation is not essential and cites many authorities in support of his contention. However, the question has been conclusively answered in the case of *State v. Eisen*, 53 Or. 297 (99 Pac. 282, 100 Pac. 257),

wherein it is expressly held that a female minor, of the age of fifteen years or over, if married, is not and cannot be a delinquent child within the meaning of the statute upon which this indictment is based, and that it must affirmatively appear in the indictment that such minor was unmarried at the time of the commission of the alleged wrongful acts. It follows that the judgment of the lower court must be affirmed, and it is so ordered. **AFFIRMED.**

McBRIDE, C. J., not sitting.

Submitted on briefs at Pendleton October 25, affirmed November 16, 1920.

BUNNEL v. BUNNEL.

(193 Pac. 201.)

Divorce—Evidence Insufficient to Show Cruel and Inhuman Treatment.

1. In a husband's action for divorce, evidence held insufficient to show that the wife was guilty of cruel and inhuman treatment; it not appearing that she was so neglectful of her household duties as to be cruel, or that her boasts as to her previous admirers, which were in line with her husband's boasts, amounted to cruelty.

From Wallowa: **JOHN W. KNOWLES**, Judge.

In Banc.

This is a suit for divorce. The complaint is founded upon allegations of cruel and inhuman treatment and personal indignities, rendering plaintiff's life burdensome. The answer denies the allegations of cruel treatment. There was a trial, resulting in a decree dismissing the complaint. **AFFIRMED.**

For appellant there was a brief submitted over the name of *Mr. J. A. Burleigh*.

For respondent there was a brief prepared and submitted over the name of *Mr. Daniel Boyd*.

BENSON, J.—The substantial contention of plaintiff is succinctly stated in a question asked of him by his attorney, and in his answer thereto, which are as follows:

“Q. Now Tommy, the only trouble that you and your wife had was over her express statements of her love for Lem Burge, and her shiftless, careless way of taking care of the home, wasn't it?

“A. Yes, sir.”

The record discloses that these young people were married on September 30, 1919, and that this suit was begun on May 4, 1920, or a little over seven months after the wedding. When they were married, the plaintiff was about twenty-two years of age, and the defendant between eighteen and nineteen. Very soon after the marriage, in an exuberance of youthful folly and indiscretion, the young couple began to boast, he of his conquests with other girls, prior to his wedding, and she, in turn, regarding the desirability as a husband of a young man named Burge, with whom she had kept company prior to her union with plaintiff. This sort of thing, however, did not continue very long, for the reason, as the wife says, that, discovering that it annoyed her husband, she ceased her part in the foolish conversation. These conversations do not appear to have had any material effect upon their marital relations, as they continued to manifest their affection for each other, and to sustain the intimate relations of husband and

wife, up to the twenty-seventh day of April, 1920, when plaintiff went to a hospital to be operated upon for hernia, at which time his wife went to town with him, staying with a married sister, who lived in the town and visited him daily at the hospital, where he remained about two weeks. There appears to have been no friction between them during this time, until shortly before plaintiff's departure from the hospital, at which time they had a small "spat" over the wife's treatment at the hospital, and as to where she should go after his leaving the hospital. This little quarrel does not impress one as being at all serious, but immediately thereafter the plaintiff sent for his attorney and began this suit.

We are of the opinion that the evidence as to the wife's talk regarding her former admirer, under the circumstances, falls short of being cruel and inhuman treatment, nor do we find anything justifying a divorce in the small dispute which they had at the hospital. As to her neglect of her household duties, the most that can be said of the evidence upon this feature, taking as true the plaintiff's version of it, is that she is not an enthusiastic housekeeper, nor exceptionally efficient therein. It appears that, whenever she could, she got her husband to help her with the cooking and with the laundry work, which involved the use of a washing-machine. It is also established that for a portion, at least, of the time when her husband found it necessary to do the cooking, she was being treated by the family physician for acute inflammation of the kidneys and was in no condition to do housework. Taken altogether, the evidence falls far short of that degree which would justify a divorce for cruel and inhuman treatment.

The decree of the lower court is therefore affirmed.

AFFIRMED.

Argued at Pendleton October 27, reversed and remanded with directions, November 16, 1920.

STATE v. KLEIN.

(193 Pac. 208.)

Animals—Killing to Prevent Trespass Does not Prove Wanton or Malicious Killing.

1. Evidence that accused shot and killed the cow of another because she was breaking into his hay corral does not prove that the killing was malicious and wanton, as defined by Sections 2396, 2398, L. O. L., so as to justify his conviction under Section 1969, but is merely proof of civil liability under Section 5767.

From Harney: DALTON BIGGS, Judge.

In Banc.

The defendant was indicted by a grand jury for the crime of wantonly and maliciously killing a cow, the property of another. The defendant entered a plea of not guilty and a trial was had resulting in a verdict of guilty, upon which the defendant was subsequently sentenced to a term in the penitentiary, from which judgment he prosecutes this appeal.

REVERSED AND REMANDED.

For appellant there was a brief and an oral argument by *Mr. H. V. Schmalz*.

For the State there was a brief over the names of *Mr. Geo. S. Sizemore*, District Attorney, *Mr. F. E. Swope* and *Mr. L. A. Lilqvist*, Assistant Attorney General, with an oral argument by *Mr. Lilqvist*.

BENSON, J.—The indictment is founded upon Section 1969, L. O. L., making it a crime to “maliciously or wantonly kill, wound, disfigure, or injure any animal, the property of another * * .” The only evidence disclosed by the record, connecting the

On right to kill trespassing animals, see notes in 1 Ann. Cas. 193; 16 Ann. Cas. 951; Ann. Cas. 1913C, 970.

defendant with the killing of the cow, is found in the testimony of the witness, Barth, who testifies that on the evening of April 13, 1919, at about 9 o'clock, he heard a shot fired from the direction of defendant's premises, and that on the next day he met the defendant and asked him what he was shooting at the previous night, to which the defendant replied that he had shot at a cow which was trying to break into his hay corral. Witness then asked, "Did you kill her?" to which the defendant replied, "No, but believe me, she run, and she never stopped running." This testimony coupled with the fact that the dead cow was subsequently found lying upon defendant's land, constitutes the substantive case against him. There is no evidence that the defendant entertained any hostility toward the owner of the animal, nor is there any evidence that he had any knowledge whatever as to the ownership of the cow. The evidence introduced by the prosecution, so far as it tends to prove the killing of the cow, also tends to prove that he shot the animal because it was trespassing upon his land, and trying to break into his hay corral. It is conceded that before there can be a conviction under Section 1969, L. O. L., there must be proof aduced that the acts of the defendant were either malicious or wanton. Section 2396, L. O. L., reads thus:

"The terms, 'malice' and 'maliciously,' when so employed, import a wish to vex, annoy, or injure another person, established either by proof or presumption of law."

Tested by this definition, it will be seen at once that there is a total failure of proof as to any malicious motive in the alleged killing.

Section 2398, L. O. L., defines the term "wantonly" thus:

“The term, ‘wantonly’ when applied to the commission of an act, implies that the act was done with a purpose to injure or destroy without cause and without reference to any particular person.”

Hence, if the defendant shot the cow because she was trying to break into his hay corral, it cannot be said to have been without cause, or a wanton act. It seems clear that the legislature recognized this distinction when it enacted Section 5767, L. O. L., being a part of the chapter on fences, which reads thus:

“If any person damaged for want of such sufficient fence shall hurt, lame, kill, or destroy, or cause the same to be done, by shooting or otherwise, any of the animals in this chapter mentioned, such persons shall satisfy the owner in double damages, with costs.”

This section provides a penalty by way of civil damages for acts whose commission had not been guarded against by the Criminal Code.

The judgment is therefore reversed, and the cause will be remanded, with directions to the lower court to dismiss the action and discharge the defendant.

REVERSED AND REMANDED WITH DIRECTIONS.

Argued September 20, affirmed November 16, 1920.

ROSENBERG SUIT & COAT CO. v. GENERAL
ACCIDENT FIRE & LIFE ASSUR. CORP.

(193 Pac. 441.)

**Reformation of Instruments—Complaint must Allege That Mistake
was Mutual or Originated in Fraud.**

1. A complaint, in a suit for the reformation of a written instrument, must allege that the mistake was mutual, and did not arise from plaintiff's own gross negligence, or that his misconception originated in the fraud of defendant.

On pleading in suit for reformation of instruments, see note in 65 Am. St. Rep. 496.

Appeal and Error—Defect in Complaint Waived, Where not Challenged Below by Demurrer.

2. Though the complaint for reformation of a policy of burglar insurance was defective in failing to allege that the mistake was mutual, etc., yet where it was not challenged by demurrer, it cannot, after decree, be attacked in the appellate court, and the defective statement will there be treated as sufficient.

From Multnomah: CALVIN U. GANTENBEIN, Judge.

Department 1.

This is a suit to reform a policy of insurance against loss by burglary thereunder. There was a decree for the plaintiff and defendant appeals.

AFFIRMED.

For appellant there was a brief over the name of *Messrs. Wilbur, Spencer, Beckett & Howell*, with an oral argument by *Mr. S. C. Spencer*.

For respondent there was a brief over the names of *Mr. F. S. Senn* and *Mr. Morris Goldstein*, with an oral argument by *Mr. Senn*.

BENSON, J.—There is but one question presented upon this appeal, and that is raised by defendant's contention that the complaint does not state facts sufficient to constitute a cause of suit.

The portion of the complaint whose sufficiency is challenged reads thus:

“That on the third day of October, 1918, plaintiff and defendant entered into a contract of insurance whereby defendant contracted and agreed for a premium to indemnify the plaintiff against all loss by burglary of merchandise plaintiff may have at No. 144-146 Third Street, Portland, Oregon. That it was contracted and agreed that said contract of insurance and indemnity should become effective from noon, October 3, 1918, and continue for a period of

one year. That in accordance with said contract of insurance and in accordance with said agreement, a certain policy of insurance was made, executed, and delivered by the defendant to the plaintiff, but said policy of insurance erroneously and mistakenly stated the date of the commencement of said insurance as of noon, October 8, 1918, contrary to the agreement and contract aforesaid."

The complaint further recites that "during the evening of October 4th and the morning of October 5, 1918," the burglary was effected, resulting in the loss, and that defendant was promptly notified thereof.

1, 2. Defendant relies upon the well-established doctrine that a complaint in a suit for the reformation of a written instrument must allege that the mistake was mutual, and did not arise from his own gross negligence, or that his misconception originated in the fraud of the defendant. This doctrine is too well settled to require citations to support it. However, it appears that no demurrer was interposed to the complaint, and that it was presented here for the first time. It has been repeatedly held by this court that in the absence of demurrer, and after decree, a defective statement of a cause of suit will be held sufficient, and this rule has been applied specifically to cases like the one at bar, wherein it was sought to reform a written instrument. In the case of *Osborn v. Ketchum*, 25 Or. 352 (35 Pac. 972), a case in which the plaintiff sought the reformation of a deed, the complaint did not allege the probative facts as fully or as clearly as is done in the instant case, and yet this court, speaking by Mr. Justice MOORE says:

"In *Hyland v. Hyland*, 19 Or. 51 (23 Pac. 811), it was held, a similar complaint being under consideration, that it was not a case of a defective cause of

suit, but of a defective statement of it; that if the case had been presented in this court upon demurrer to the pleading, the demurrer would probably have been sustained, and that, having answered, every reasonable inference should be in favor of the complaint that could be drawn therefrom. If it had been the intent of Critcherson to purchase the real property mentioned in the amended description, and the intention of Ketchum to grant and convey another tract, then the minds of the parties never met or agreed upon the terms of the contract, and hence the mistake, if any, would not have been mutual. But here—while conceding that the description in the deed is different from that now sought to be established—the plaintiff distinctly alleges that it was the actual intention of both parties to purchase and convey the property by the description as amended; hence it follows that, in the absence of a demurrer to the complaint, these necessary allegations are to be inferred.”

The conclusion reached in the case from which we have just quoted is peculiarly applicable to the case at bar, and we conclude that the decree of the lower court should be affirmed, and it is so ordered.

AFFIRMED.

McBRIDE, C. J., and HARRIS, J., concur.

BURNETT, J., Dissenting.—The only question presented to us on appeal in this case is the sufficiency of the facts stated in the complaint to constitute a cause of suit for the reformation of a contract of insurance on the ground of mistake. The first two paragraphs of that pleading are devoted to a description of the corporate character of the parties. The third paragraph reads thus:

“That on the third day of October, 1918, plaintiff and defendant entered into a contract of insurance,

whereby defendant contracted and agreed for a premium to indemnify the plaintiff against all loss by burglary of merchandise plaintiff may have at No. 144-146 Third Street, Portland, Oregon. That it was contracted and agreed that said contract of insurance and indemnity should become effective from noon, October 3, 1918, and continue for a period of one year. That in accordance with said contract of insurance and in accordance with said agreement, a certain policy of insurance was made, executed and delivered by the defendant to the plaintiff, but said policy of insurance erroneously and mistakenly stated the date of the commencement of said insurance as of noon, October 8, 1918, contrary to the agreement and contract aforesaid."

Following this is a statement that on the evening of October 4th, the very next day after the contract was made as before stated, a burglary was committed in the plaintiff's store, whereby thirty-eight coats of many colors, eight suits, and three dresses were taken away, to the total loss of the plaintiff in the sum of \$1,001. The fifth and last paragraph of the complaint reads thus:

"That immediately after said burglary and felonious taking, as aforesaid, this plaintiff notified the defendant thereof, but this defendant wrongfully denied liability. That this plaintiff has done all things required by the policy and submitted proof of loss to the defendant, and the same has been accepted, but the defendant has never questioned or denied it."

Attached to the complaint as an exhibit is a copy of the written instrument referred to in the third paragraph.

It is a codified platitude that the objection that the complaint does not state facts sufficient to constitute a cause of suit is never waived, and may be urged for the first time in the appellate court, without assign-

ing the same as one of the grounds of appeal: Or. L., § 72; *Bowen v. Emmerson*, 3 Or. 452; *King v. Boyd*, 4 Or. 326; *Evarts v. Steger*, 5 Or. 149; *Mack v. Salem*, 6 Or. 278; *McKay v. Freeman*, 6 Or. 449; *State v. McKinnon*, 8 Or. 487; *Weissman v. Russell*, 10 Or. 74; *Carver v. Jackson County*, 22 Or. 63 (29 Pac. 77); *Ball v. Doud*, 26 Or. 14 (37 Pac. 70); *Schmit v. Day*, 27 Or. 116 (39 Pac. 870); *Wyatt v. Henderson*, 31 Or. 48 (48 Pac. 790); *Willetts v. Walter*, 32 Or. 413 (52 Pac. 24); *Hargett v. Beardsley*, 33 Or. 304 (54 Pac. 203); *Moore v. Halliday*, 43 Or. 250 (72 Pac. 801, 99 Am. St. Rep. 724); *Adams v. Kelly*, 44 Or. 69 (74 Pac. 399); *Kalyton v. Kalyton*, 45 Or. 116 (74 Pac. 491, 78 Pac. 332); *David v. Moore*, 46 Or. 154 (79 Pac. 415); *Horn v. United States M. Co.*, 47 Or. 125 (81 Pac. 1009); *Keene v. Eldriedge*, 47 Or. 181 (82 Pac. 803); *Woolley v. Plaindealer Pub. Co.*, 47 Or. 626 (84 Pac. 473, 5 L. R. A. (N. S.) 498); *Sutherlin v. Bloomer*, 50 Or. 398 (93 Pac. 135); *Parrish v. Parrish*, 52 Or. 161 (96 Pac. 1066); *Siverson v. Clanton*, 88 Or. 261 (170 Pac. 933, 171 Pac. 1051); *Service v. Sumpter Valley R. R. Co.*, 88 Or. 554 (171 Pac. 202). It is said in argument in the plaintiff's brief that—

“To say that a mistake is mutual is alleging a mere conclusion of law; it is not the allegation of a fact, and has no place in a complaint.”

Even so; but this is all that is stated in the present complaint. The only words in the faintest way indicating a mistake are the adverbs in the clause “erroneously and mistakenly.” These add nothing to the force of the allegation. They do not constitute an issuable averment. It is analogous to the principle that to say an act was done fraudulently is not sufficient, but it is requisite that the facts upon

which fraud is predicated must be alleged, so that the court may draw from those facts the legal conclusion that a fraud has been perpetrated. There is no fact stated in the complaint before us indicating what the defendant intended to put into the written policy: *Evarts v. Steger*, 5 Or. 147, 151. For all that appears in the pleading, having been notified of the burglary before the policy was issued, or immediately after the theft, as stated in the fifth averment, the defendant purposely dated the instrument on October 8th, when it was actually issued. Neither is it stated that when the policy was delivered the plaintiff failed to observe that the date of its commencement was October 8th instead of October 3d.

The utmost that can be predicated of the allegations of the complaint on this subject is that application was made for insurance to commence October 3d, in response to which the defendant tendered a policy beginning October 8th. This, if anything, amounts only to a breach of the preliminary contract of insurance mentioned in the complaint, for which the remedy at law for damages is ample. It is not even stated that the plaintiff accepted the policy, being legitimately ignorant of its terms. As stated in *Peninsula Lumber Co. v. Royal Indemnity Co.*, 93 Or. 634 (184 Pac. 562):

"In this state the precept is thoroughly established and of long standing that in suits to reform a written instrument on the ground of mistake the complaint must clearly state what the original agreement of the parties was, and point out with precision wherein there was a misunderstanding; that the mistake was mutual, and did not arise from the gross negligence of the plaintiff, or that the misconception originated in the fraud of the defendant: *Boardman v. Insurance Co. of Pennsylvania*, 84 Or. 60 (164 Pac. 558);

Evarts v. Steger, 5 Or. 147; *Lewis v. Lewis*, 5 Or. 169; *Stephens v. Murton*, 6 Or. 193; *McCoy v. Bayley*, 8 Or. 196; *Foster v. Schmeer*, 15 Or. 363 (15 Pac. 626); *Hyland v. Hyland*, 19 Or. 51 (23 Pac. 811); *Meier v. Kelly*, 20 Or. 86 (25 Pac. 73); *Epstein v. State Ins. Co.*, 21 Or. 179 (27 Pac. 1045); *Kleinsorge v. Rohse*, 25 Or. 51 (34 Pac. 874); *Osborn v. Ketchum*, 25 Or. 352 (35 Pac. 972); *Thornton v. Krimbel*, 28 Or. 271 (42 Pac. 995); *Mitchell v. Holman*, 30 Or. 280 (47 Pac. 616); *Sellwood v. Henneman*, 36 Or. 575 (60 Pac. 12); *Stein v. Phillips*, 47 Or. 545 (84 Pac. 793); *Bower v. Bowser*, 49 Or. 182 (88 Pac. 1104); *Smith v. Interior Warehouse Co.*, 51 Or. 578 (94 Pac. 508, 95 Pac. 499); *Howard v. Tettlebaum*, 61 Or. 144 (120 Pac. 373); *Suksdorf v. Spokane, P. & S. Ry. Co.*, 72 Or. 398 (143 Pac. 1104); *Hyde v. Kirkpatrick*, 78 Or. 466 (153 Pac. 41, 488).''

Besides the element of mutuality in mistake, an essential part of the pleading is that the mistake did not arise from the gross negligence of the plaintiff. It is as necessary to plead this feature as any other. It is not a legitimate exercise of equity jurisprudence to read into a written agreement, on the ground of mistake, terms which one or both of the parties actually, albeit wrongfully, intended should not be included. Neither should the chancellor assume to act as guardian for the heedless or careless party as against one vigilant in his own interest, and make a new contract to protect the former against his own inattention. For these reasons it is required by the long line of precedents in this state: First, that the pleading of the suitor should state facts from which the conclusion may be drawn that the mistake was indeed mutual or that of both parties, and not of one only; and, second, that the complaint should contain other averments from which the court may conclude that the plaintiff was not negligent of his own

affairs. Of course, there may be mistake of one party induced by the deceit of the other, constituting a situation from which equity will relieve the innocent party, but there is no pretense that such is the condition in the instant case. As stated in *Lewis v. Lewis*, 5 Or. 169, 173, citing Willard's Equity Jurisprudence:

"It is not every mistake in a conveyance that can call for the interposition of a court of equity. * * To entitle the party to relief the fact must be material, and also such that he could not with reasonable diligence have obtained knowledge of it."

Again, in *Meier v. Kelly*, 20 Or. 86, 94 (25 Pac. 73, 76), the rule is laid down thus:

"It has been repeatedly held by this court that, in a suit to reform a written instrument on the ground of mistake, the complaint must allege, distinctly, what the original understanding and agreement was, or point out with clearness and precision wherein there was a mistake, and that it did not arise from the gross negligence of the plaintiff, and the mistake must appear to have been mutual."

These early precedents on pleading mistake have never been overruled, but have been upheld constantly, and consistently followed by this court. Apropos to this branch of the case is the following excerpt from *Bidder v. Carville*, 101 Me. 59 (63 Atl. 303, 115 Am. St. Rep. 303):

"While a court of equity may decree the rescission of a contract for a mistake which is unilateral, the power should not be exercised against a party whose conduct in no way contributed to or induced the mistake, and who will obtain no unconscionable advantage thereby. * * Equity assists only the vigilant. It does not relieve against mistakes which ordinary care would have prevented. Conscience, good faith

and reasonable diligence are necessary to call a court of equity into activity."

As to this, the complaint does not present a case of a mere defective statement of a good cause of suit. There is nothing in that pleading which in the remotest degree alluded to the requirement that the plaintiff must aver that the mistake did not arise from his own negligence. Far from that, the plaintiff does not attribute the mistake to the oversight of either party, but speaks of it impersonally, that "said policy of insurance erroneously and mistakenly stated the date." In all of the cases cited by the plaintiff which discuss the question of pleading at all, some circumstances are set forth in addition to the mere execution or tender of the contract which is sought to be reformed, which tend to show the mistake, and that it was the result of the inadvertence of both parties. For instance, in *Foster v. Schmeer*, 15 Or. 363, 368 (15 Pac. 626, 629), Mr. Justice THAYER said:

"The pleader did not, as I consider, properly allege the facts so as to entitle a party to have, in a strict sense, the contract reformed. He should have alleged more than that it was erroneous in certain particulars, and for what purpose the partnership was formed. He would ordinarily have to set out the terms of the contract as the parties made it, what they each undertook and agreed to do, and show why its terms happened to be left out when it was attempted to be reduced to writing, or how terms not agreed upon came to be inserted. * * Reforming a written contract on the grounds of mistake is the exercise of the ordinary jurisdiction of a court of equity. That court, however, has always required, in all cases coming under that head, strong and convincing proof of the mistake. It never undertakes to make contracts for parties; it leaves them to do

that for themselves; but where it is shown that there has been a mistake, that, if not corrected, would operate to the prejudice of a party, and that it did not occur through the party's carelessness or negligence, it will correct it."

In *Osborn v. Ketchum*, 25 Or. 352 (35 Pac. 972), the effort was to reform a deed. After stating the description in the deed in question and the description requisite to cover what was intended to be conveyed, the pleader, as tending to show that the mistake was mutual, went on to aver that immediately after the execution and delivery of the deed in question the grantee went into possession of the land intended to be conveyed; and that the grantor assisted him in the erection of buildings on the premises intended to be conveyed, but outside of the limits included in the erroneous description. The allegation of the conduct of the parties gives color and force to the language of Mr. Justice MOORE, who wrote the opinion, to the effect that, in the absence of demurrer which might have been sustained if presented to the trial court, the pleading would be more liberally construed on appeal. He recites that the plaintiff distinctly alleges that it was the actual intention of both parties to purchase and convey the property by the amended description. In the instant case, however, there is absolutely no shadow of an allegation as to the intention of the parties in reducing the agreement to writing. Also, in *Hyland v. Hyland*, 19 Or. 51 (23 Pac. 811), cited in *Osborn v. Ketchum*, acts of the parties were averred, indicating performance of the alleged agreement from which the court could conclude that a mistake had been made in reducing the contract to writing. In other words, with the conduct of the parties in per-

formance of the covenant involved, appearing by the averments of the complaint, the legal conclusion will arise that there must be a mistake in the writing, else the parties would not have acted as they did concerning it.

As stated, the complaint simply presents a case where one party demanded a policy with one date, and the other furnished one with a different date. This does not constitute a mutual mistake in any sense of the word. Without overturning practically every decision requiring mutuality of mistake we cannot dispense with that element in such cases, and it, as well as the allegation of absence of negligence of the plaintiff, is an absolutely necessary averment in any such complaint. Neither averment appears in this complaint, and this constitutes a fatal objection to the pleading. There is nothing in the statement from which we can infer either mistake of both parties or diligence on the part of the plaintiff. It is akin to the proposition that a party who can read and has the opportunity to read is bound by the terms of an instrument, if he does not read it: *Spitze v. Baltimore & O. R. R. Co.*, 75 Md. 162 (28 Atl. 307, 32 Am. St. Rep. 378); *Hoeger v. Citizens' St. Ry. Co.*, 36 Ind. App. 662 (76 N. E. 328); *Atchison, T. & S. F. R. Co. v. Vanordstrand*, 67 Kan. 386 (73 Pac. 113); *McNamara v. Boston Elev. Ry. Co.*, 197 Mass. 383 (83 N. E. 878); *Leddy v. Barney*, 139 Mass. 394 (2 N. E. 107); *Mateer v. Missouri Pac. Ry. Co.*, 105 Mo. 320 (16 S. W. 839); *Williams v. Wilson*, 18 Misc. Rep. 42 (40 N. Y. Supp. 1132); *Missouri, K. & T. Ry. v. Craig*, 44 Tex. Civ. App. 583 (98 S. W. 907); *Watson v. Planters' Bank*, 22 La. Ann. 14; *Eldridge v. Dexter R. Co.*, 88 Me. 191 (33 Atl. 974); *Leslie v. Merri- 98 Or.—9*

Starr v. Bennett, 5 Hill (N. Y.), 303; *Gibson v. Brown*, (Tex. Civ. App.), 24 S. W. 574; *Powers v. Powers*, 46 Or. 479 (80 Pac. 1058).

The decree should be reversed.

For these reasons, I dissent from the opinion of Mr. Justice BENSON.

Submitted on briefs at Pendleton October 28, affirmed November 23, 1920.

STATE v. WILDER.

(193 Pac. 444.)

Criminal Law—Voluntary Confession Admissible, Though Accused was not Cautioned.

1. A confession made while in custody, not induced by threats or promises of immunity, is admissible, though accused was not cautioned that it might be used against him nor advised as to his legal rights.

Criminal Law—Bad Faith of Prosecuting Officer in Asking Impeaching Question not Presumed.

2. In the absence of evidence on the subject, bad faith on the part of the prosecuting officer in asking defendant an impeaching question cannot be presumed, though he did not follow this with testimony of an impeaching witness.

Criminal Law—Court's Attention must be Directed to Failure to Instruct.

3. Failure of the court to instruct on pertinent matters is not error when the court's attention is not directed thereto.

Criminal Law—Requested Instruction on Reasonable Doubt Properly Refused Where Covered by Instructions Given.

4. Requested instruction on reasonable doubt *held* covered by instructions given, so that its refusal was not error.

On admissibility of confessions in general, see notes in 6 *Am. St. Rep.* 242; 19 *Am. St. Rep.* 814; 73 *Am. St. Rep.* 943.

The question as to when confession is voluntary is discussed in notes in 18 *L. R. A. (N. S.)* 771, and 50 *L. R. A. (N. S.)* 1077.

On whose promises are contemplated by rule excluding confession made under promise of immunity, see note in 7 *A. L. R.* 419.

Criminal Law—Instruction Assuming Evidence of Good Character Properly Refused.

5. Requested instruction as to consideration of evidence of good character was properly refused, it assuming there was such evidence, but the transcript of the testimony containing none.

From Umatilla: GILBERT W. PHELPS, Judge.

In Banc.

The defendant was tried upon an indictment charging him with murder in the second degree for having killed one Bert W. H. McNease. There was a trial, resulting in a verdict of guilty, and the defendant was sentenced to be imprisoned in the penitentiary for the term of his natural life, from which judgment he appeals.

AFFIRMED.

For appellant there was a brief submitted over the name of *Messrs. Peterson, Bishop & Clark*.

For the State there was a brief prepared and submitted over the names of *Mr. George M. Brown*, Attorney General, *Mr. R. I. Keator*, District Attorney, and *Mr. Charles Z. Randall*, Deputy District Attorney.

BENSON, J.—1. The assignments of error attack the correctness of the ruling of the court in admitting, over defendant's objection, the testimony of the sheriff, T. D. Taylor, and his deputy, J. A. Blakely, regarding a confession alleged to have been made by the defendant after being placed under arrest. It appears from the record that the defendant was arrested and confined in the county jail on the night of September 18, 1919, and on the morning of September 19th the sheriff had him brought to his private office, where he began questioning him in regard to his ownership of a pistol, and during the conversa-

tion the deputy sheriff, Blakely, entered the room and participated in the conversation. When the preliminary questions leading up to this conversation were asked of the sheriff upon the witness-stand, the court sent the jury out, and in their absence proceeded to take testimony as to the circumstances under which the alleged confession had been made. We have examined this evidence with great care, and find, as did the trial court, that there was no coercion used in securing the alleged confession; no threats were employed, nor were there any promises of any character to excite fear or arouse hope. The theory of counsel for defendant as to this evidence is fairly stated in his brief thus:

“He [the sheriff] did not tell the defendant that anything he might say would be used against him in evidence upon the trial if he should be indicted; that he did not inform him that what he might say would be told to the prosecuting attorney; that he did not tell him he need not make any statement unless he wanted to; that he did not tell him that whatever the defendant might say about the matter would be told by the sheriff upon the witness stand at the time of the trial, if defendant should be indicted.”

It is also urged that he was not then advised of his right to consult counsel before answering the questions propounded by the sheriff.

The essential element in the admissibility of a confession is that it must be shown to have been made under such circumstances as to be free from fear induced by threats, and not induced by promises or suggestions holding out the hope of immunity. The fact that a confession is made without the accused having been cautioned that it may be used against him does not render the evidence incompetent, unless there is a statute which invalidates a confession

which is obtained when the accused is not so cautioned: 12 Cyc. 463. In this state we have no such statute, and it has been held by this court that a confession is not rendered inadmissible by the fact that accused had not been advised as to his legal rights: *State v. Scott*, 63 Or. 444 (128 Pac. 441); *State v. McPherson*, 70 Or. 371 (141 Pac. 1018). We are satisfied that the evidence fully justifies the finding of the trial court that the confession of the defendant was voluntary, and was therefore properly admitted in evidence.

2, 3. It is urged that the court erred in overruling defendant's objection to the following impeaching question:

"I will ask you if, on the night of the 17th of September, 1919, after you were brought to the jail and tumbled in the jail at the courthouse at Pendleton, Oregon, yourself and Orval Sanders, sometimes known as Shorty Sanders, and no other person being present, and while in conversation with Orval Sanders you did not say, 'I killed that man, but I have an eye-witness who is a good friend of mine, and he will clear me,' or words to that effect."

The witness replied that he had made no such statement. Sanders was not called as a witness, and the defendant bases his claim of error upon the fact that the state did not follow its impeaching question with the testimony of an impeaching witness, and that the court failed to instruct the jury to disregard the question and answer. It appears to be the theory of the defendant that the question was asked in bad faith, without any evidence in reserve wherewith to justify it. The record is silent upon the subject, although in his brief the district attorney explains that the witness failed to appear in response to the subpoena in time to be placed upon the witness-

stand. In the absence of evidence upon the subject we cannot presume bad faith upon the part of the prosecuting officer. It may also be observed that the defendant does not appear to have asked for any instruction upon this point, or to have called the attention of the court to the matter at the time of charging the jury. It has always been held by this court that the failure of the court to instruct upon pertinent matters is not error, when the attention of the court is not directed thereto: *Page v. Finley*, 8 Or. 45; *Hurst v. Burnside*, 12 Or. 520 (8 Pac. 888); *State v. Donahue*, 75 Or. 409 (144 Pac. 755, 147 Pac. 548, 5 A. L. R. 1121).

4. The remaining assignments of error challenge the action of the court in refusing certain requested instructions. The first of these reads as follows:

"Gentlemen of the jury, if, from all of the testimony in this case, there is a reasonable doubt in your minds as to whether Bert W. H. McNease was killed by Charles Jones, one of the witnesses in this case, or was killed by the defendant, the defendant would be entitled to the benefit of the said reasonable doubt, and it would be your duty to return a verdict of not guilty."

So far as this requested charge involves a statement of the law, it is directed solely to the subject of reasonable doubt, and an examination of the instructions which were given by the court discloses that this topic was quite fully covered by the court as follows:

"Before you can find the defendant guilty of the crime charged in the indictment, or of any crime included therein, you must find that each material allegation of the indictment and every fact and element necessary to constitute said crime has been proven beyond a reasonable doubt."

"Upon such allegation, fact, or element, if you entertain a reasonable doubt, it is your duty to give the benefit of such doubt to the defendant and acquit him.

"You are instructed that the benefit of any reasonable doubt as to the cause or reason of the killing of the said Bert W. H. McNease should be resolved in the defendant's favor. No man should be convicted of a crime upon mere suspicion or because he may have had an opportunity to commit the crime or simply because he has been accused by a grand jury."

From the foregoing quotations, it is manifest that the court fully covered the subject of reasonable doubt, and the defendant was not entitled to any further instructions upon that point.

Defendant's requested instructions numbered 5 and 8 are in the same class with the one which we have just discussed, and need not be further considered.

5. Defendant's requested instruction numbered 7 relates to the good character of the defendant, and contains the following language:

"Evidence of good character is always an important matter for the consideration of the jury in a case of this kind. This is particularly so in a case involving the consideration of a reasonable doubt. * * If there should be, from all the testimony in this case, an absence of an inducing cause or motive on the part of the defendant to commit the crime charged in the indictment, and a doubt as to who caused the death of the said Bert W. H. McNease, this fact would afford a presumption of the innocence of the defendant."

The foregoing quotation assumes that there was evidence introduced regarding the character of the defendant, but the transcript of the testimony does not contain a particle of such evidence, and the request was properly refused.

The remaining requests, so far as they declare the law, were fully covered by the charge which was given by the court.

Finding no error in the record, the judgment is affirmed. **AFFIRMED.**

BROWN, J., not sitting.

Argued October 14, affirmed November 23, 1920.

LA FOLLET v. JONES.

(193 Pac. 446.)

Evidence—Agency Held Sufficiently Shown to Admit Conversation With Principal.

1. In an action for the possession of sheep owned by a third person, evidence held to establish plaintiff's agency for such person sufficiently to justify admission of a conversation between defendant and the third person.

Appeal and Error—Error in Instruction Held Cured by Verdict for Defendant on Separate Independent Issue.

2. In action for possession of sheep, any error in an instruction as to plaintiff's former right of possession as between him and the owner, a third party, was immaterial, where the verdict showed that the jury did not find against plaintiff as having no special property or ownership, but found in favor of defendant on his affirmative answer that he took up the sheep for trespassing and cared for them.

From Marion: PERCY R. KELLY, Judge.

Department 2.

This is an action for the possession of sixty-one sheep and damages for the taking and detention of the same. The cause was tried by the court and a jury, and a verdict rendered in favor of defendant. Plaintiff appeals from the resulting judgment. The

complaint is in the usual form. The defendant in his answer pleaded in substance:

That plaintiff's and defendant's farms are adjoining each other, with a partition fence between them; that plaintiff and defendant agreed that each should keep his stock on his own premises; and that, if the stock of either crossed on to the premises of the other, the owner of the premises should take up and confine such stock and hold the same until the charges therefor were paid.

"That thereafter, and in violation of the terms of said agreement, the plaintiff continued to permit his stock to trespass on the said lands of the defendant, thereby injuring and destroying crops growing on said premises, by reason whereof the defendant sustained damage, and that on or about the 12th day of August, 1918, the sheep mentioned in plaintiff's amended complaint had crossed through said partition fence from plaintiff's premises, and were trespassing on the defendant's said premises, and causing damage as aforesaid, and thereupon, and in pursuance to the terms of the agreement between plaintiff and the defendant, the defendant took up and confined said sheep until the same were taken from the defendant by the sheriff of Marion County, Oregon, and delivered to plaintiff after the institution of this action."

That defendant and the owner of the sheep, F. B. Decker, acting for himself and plaintiff, agreed upon the sum to be paid to release the sheep, but that the same had not been paid.

The reply put in issue the affirmative matter of the answer, except as to the ownership of the adjoining premises.

AFFIRMED.

For appellant there was a brief over the names of *Messrs. Carson & Brown* and *Mr. John Bayne*, with an oral argument by *Mr. Thomas Brown*.

For respondent there was a brief over the names of *Mr. John H. McNary* and *Messrs. Smith & Shields*, with oral arguments by *Mr. McNary* and *Mr. Roy Shields*.

BEAN, J.—1. Plaintiff assigns (1) that the court erred in permitting the defendant, upon his direct examination over the objection of the plaintiff, to relate a conversation he had with one F. B. Decker, not made in the presence and hearing of the plaintiff, about the property in controversy, and in permitting him to answer the following questions:

“Q. (Mr. Shields continuing:) Just relate the conversation, Mr. Jones.

“A. Well, when I got back to the auto, I says to Decker, ‘When are you going to get the sheep?’ ‘Why,’ he says, ‘In three or four days I will be after the sheep or send a man.’ That was about thirty days I had had them up then; that is, in the pasture; and he says, ‘What are the charges?’ ‘Why,’ I says, ‘about twenty-five dollars for the time’; and the next I heard of—I didn’t hear anything more—

“Q. (Interrupting.) What did he say about paying for—

“A. Why, he said, ‘All right’; he said he would come and get the sheep is what he said, exactly.”

It is contended by plaintiff’s counsel that there was no competent proof of the agency of Decker, and that the testimony was mere hearsay. It appears from the bill of exceptions that Mr. Decker was the real owner of the sheep, and by a written contract, in evidence, leased them to plaintiff on the shares. After the sheep had trespassed upon defendant’s land, at defendant’s solicitation, plaintiff came and examined defendant’s field of grain to see what damage the sheep had done, after which plaintiff said to defendant, “Those are Mr. Decker’s sheep.” At

another time, when La Follet, Jones, and Decker were present, as plaintiff testified, Mr. Jones in a conversation stated to La Follett that "They are Decker's sheep." Plaintiff stated, "Mr. Decker is right here to speak for himself." Mr. Decker stated that "Mr. Follet has charge of the sheep." This would plainly show that Decker had authority to treat with defendant and negotiate a settlement of the affair. It was at plaintiff's instigation that defendant went to the owner in regard to the matter, and La Follet has no reason to complain because Jones testified regarding thereto. The proof of the authority of Decker to act in the matter was not wanting. It is clear that the jury did not base their verdict upon the agreement between Jones and Decker, for the court charged them that, if that agreement had been proven, the value of Jones' special property would thereby be limited to \$25. Twice this amount was found for defendant by the verdict. There was no error in admitting the testimony objected to.

2. Plaintiff complains that the court erred in giving the following instructions to the jury:

"The plaintiff's position is that he was the bailee of Mr. Decker, and as such bailee, under and by virtue of the terms of the written contract which has been entered into, was entitled to the possession and was the owner of the special property in the sheep in question, and under this character of an agreement which has been introduced in evidence, in the first sense the plaintiff would be the bailee and entitled to the possession. There is a provision in there that the plaintiff should properly fence, to protect the sheep in question, and, failing to do this, upon demand the right of possession would pass to Mr. Decker. Whether or not there was a demand, and

whether or not there was a failure, are questions of fact."

The jury found for the defendant "that the defendant is the owner of special property in and entitled to possession of the personal property described in the complaint, which special property consists of the right to the possession thereof until the payment of the reasonable expenses and charges of taking up and caring for said property, the value of which special property we assess at \$50."

Whatever may be the technical construction or effect of the instruction excepted to, it is plain from the verdict that the jury did not find against the plaintiff, for the reason that he had no special property or ownership in the sheep, nor because Decker was the real owner of the sheep. The matter of Decker's being the lessor of the sheep was proven by plaintiff. The jury found in favor of the defendant upon his affirmative answer as to taking up and caring for the trespassing sheep.

Whatever the status of the ownership of the sheep was, as between La Follet and Decker, the verdict of the jury has rendered that question immaterial. The case did not turn on that issue. It has passed beyond that point. Therefore the instruction could not have prejudiced plaintiff.

We have examined the charge to the jury at length, and the issues seem to have been fairly and plainly submitted to them. There was no reversible error in giving the instruction complained of.

Finding no error in the record, the judgment of the lower court is affirmed.

AFFIRMED.

McBRIDE, C. J., and JOHNS and BROWN, JJ., concur.

Argued October 8, modified November 23, 1920.

HANSEN v. CROUCH.

(193 Pac. 454.)

Waters and Watercourses—Watercourse may not be Obstructed by Land Owner Where Entering His Land to Injury of Upper Proprietor.

1. A stream flowing through plaintiff's land into that of defendant, if constituting a watercourse within the meaning of the common law, may not be obstructed by defendant at its entrance into his land, unless he provides some equally convenient method for draining plaintiff's land.

Waters and Watercourses—Stream Arising from Seepage or Collected in Channel Held a "Watercourse."

2. A stream existing from time immemorial, made by flow of waters arising from seepage from the hills or collected in one channel by the general slope of the surrounding country, having well-defined banks through which water is accustomed to flow, serving the useful purpose of carrying away water that would otherwise accumulate on the lands, and having a flow, though not continuous, fairly regular, and not the offspring of sudden and unusual freshets, is a "watercourse" within the common law.

Waters and Watercourses—Land Owner may Change Course of Stream if not Injuring Others.

3. Where a watercourse draining plaintiff's land enters that of defendant, he may drain it by a ditch on his land; plaintiff's only right being that its flow shall not be arrested, so as to turn it back on her land.

Injunction—Comparative Injury not Considered in Case of Continuing Trespass.

4. The Supreme Court of Oregon is not inclined to apply the rule of comparative injury in determining whether an injunction shall issue in the case of a continuing trespass.

From Coos: JOHN S. COKE, Judge.

Department 1.

This was a suit to enjoin the defendant from filling in and thereby obstructing the channel of an alleged natural watercourse so the obstruction caused

On right of land owner to impede flow of stream from lands of another, see note in 85 Am. St. Rep. 708.

On the question of liability for damming back waters of stream, see note in 59 L. E. A. 817.

the water to flow back upon the land of an adjoining proprietor to her damage.

The weight of evidence tends, in our opinion, to show that for many years plaintiff and her predecessors in interest have been the owners of a tract of land in Coos County abutting upon a body of tide water or inlet known as Haynes Slough. The defendant is an adjoining proprietor upon the east, and his land also abuts upon the slough and is slightly lower than the land of plaintiff. Originally a large portion of the lands of both plaintiff and defendant, and in fact all of that which forms the subject of this dispute, was salt marsh covered by high tides, incapable, in its natural state, of cultivation, and valuable only to a limited extent for the purpose of pasturage. About 1898 Coos County straightened and improved Haynes Slough by dredging, and the soil taken from the slough was deposited on the south bank in such quantities that it constituted a substantial dike in front of the lands of plaintiff and defendant, preventing the ingress of the tides except when they are unusually high and there is a freshet at the same time. When there is an overflow at these times the water runs off in a short time as the tide recedes. The result of this dike has been practically to reclaim the marsh lands so that with proper cultivation they are highly productive. Defendant has so improved the lands affected by this suit that their value is now estimated at about \$200 per acre. Plaintiff had not at the commencement of this suit begun the intensive cultivation of that portion of her land affected by the alleged wrongful operations of the defendant, having become the owner of the place only a short time before, but the evidence indicates that under like treatment it would become as

valuable as the improved land of defendant, and her testimony shows that but for the alleged act of defendant she would have begun plowing and cultivating it last year. Running across the northerly portion of plaintiff's land is a small tidal stream or slough varying from eighteen inches to three feet in depth and from two to four feet in width, and carrying a very small quantity of water, except when the high tides fill it, but apparently collecting from seepage from the hills and adjacent lands a sufficient amount so that there is always some water in it, which flows almost imperceptibly in a northerly and easterly direction over plaintiff's land, draining a portion of it. At a point approximately one hundred twenty-five feet north of the dike heretofore mentioned this stream bends eastward and crosses over on to the land of defendant, pursuing there a serpentine course first southerly, then easterly, and then afterwards northerly until it reaches an elbow of Haynes Slough, which has since been closed at both ends by the dike before mentioned, and where by reason of the dike and the formation of the ground there is a reservoir capable of containing the drainage water and permitting it to flow through a tide gate into Haynes Slough. Owing to the fact that many of the points referred to by the witnesses are not designated by letters or figures the above description alone may not be technically accurate, but it is believed to be approximately correct.

The evidence indicates that defendant in improving his land has filled up the waterway above mentioned, with the result that it causes the water which originally ran off through the waterway above mentioned to be detained at the point where the stream crosses the line dividing the lands of plaintiff and defendant

and caused to flow back upon plaintiff's land, submerging about an acre and causing from two to four acres to be unfit for cultivation or pasturage. If the stream is opened and the fill removed, it will render about the same amount of defendant's land unfit for cultivation, which land in its present state is worth perhaps \$800. We are of the opinion that a ditch approximately 125 feet in length dug along plaintiff's east line and communicating with Haynes Slough would obviate every difficulty now suffered by plaintiff.

The Circuit Court found that the waterway in question was an ancient watercourse, enjoined defendant from further filling it in, and assessed plaintiff's damages at \$25, from which decree defendant appeals.

MODIFIED.

For appellant there was a brief and an oral argument by *Mr. C. F. McKnight*.

For respondent there was a brief and an oral argument by *Mr. John G. Mullen*.

McBRIDE, C. J.—The common law is the rule by which we must test the respective rights of the parties to the present litigation. But for the willful stubbornness of plaintiff's husband and the defendant, the attorneys for the respective parties could have settled this dispute without resort to the courts, and at a tithe of the expense that the parties have incurred here. They laudably counseled this course, but the litigants seemed disposed to stand upon their technical legal rights, and we are now compelled to settle here a small dispute which should have been adjusted in a neighborly manner without resort to the law.

1, 2. If this stream is a watercourse within the meaning of the common law, defendant had no right to obstruct it without providing some equally convenient method by which plaintiff's land could be drained of its surplus water. While the stream in question is small and the amount of water flowing through it is comparatively insignificant, we think that it has the dignity of a watercourse as distinguished from the flow of mere surface water which is confined to no well-defined channel.

"A watercourse consists of bed, banks, and water; yet the water need not flow continually; and there are many watercourses which are sometimes dry. There is, however, a distinction to be taken in law between a regular, flowing stream of water, which at certain seasons is dried up, and those occasional bursts of water, which, in times of freshet, or melting of ice and snow, descend from the hills and inundate the country. To maintain the right to a watercourse or brook, it must be made to appear that the water usually flows in a certain direction, and by a regular channel, with banks or sides. It need not be shown to flow continually, as stated above, and it may at times be dry; but it must have a well-defined and substantial existence": Angell on Watercourses (6 ed.), § 4.

In *Earle v. De Hart*, 12 N. J. Eq. 283 (72 Am. Dec. 395), it is said:

"A watercourse is defined to be a 'channel or canal for the conveyance of water, particularly in draining lands.' It may be natural, as where it is made by the natural flow of the water, caused by the general superficies of the surrounding land from which the water is collected into one channel, or it may be artificial, as in case of a ditch, or other artificial means, used to divert the water from its natural channel, or to carry it from low lands, from which it will not flow, in consequence of the natural formation of the

surface of the surrounding land. It is an ancient watercourse, if the channel through which it naturally runs has existed from time immemorial. Whether it is entitled to be called an ancient watercourse, and, as such, legal rights can be acquired and lost in it, does not depend upon the quantity of water it discharges. Many ancient streams of water which, if dammed up, would inundate a large region of country, are dry for a great portion of the year. If the face of the country is such that it necessarily collects in one body so large a quantity of water, after heavy rains and the melting of large bodies of snow, as to require an outlet to some common reservoir, and if such water is regularly discharged through a well-defined channel, which the force of the water has made for itself, and which is the accustomed channel through which it flows, and has flowed from time immemorial, such channel is an ancient natural watercourse."

The stream here in question has all these qualities. It has existed from time immemorial. Witnesses testify that it was in existence more than thirty years ago. It was made by the flow of water arising from seepage from the hills or collected in one channel by the general slope of the surrounding country. It has well-defined banks through which water is accustomed to flow, and it serves the useful purpose of carrying away water that would otherwise accumulate upon the lands of plaintiff. Although its flow is not continuous, it appears to be fairly regular, and not the offspring of sudden and unusual freshets.

3. Without discussing at length the authorities which the learning and industry of counsel have presented, we think that plaintiff has fully established her right to the use of this stream or its equivalent for the purpose of drainage. It does not follow, however, from this position, that plaintiff has the right to prescribe the method by which defend-

ant must control the water flowing from plaintiff's land to his own. Plaintiff's rights are negative to the extent that all she can claim is that defendant shall not so use the water when it reaches his land or so arrest its flow as to cause it to turn back upon her premises. That defendant can avoid this at very small expense to himself is shown by the testimony of Mr. Cathcart, and, indeed, by his own, by constructing a ditch along the boundary line between himself and plaintiff, and thence to the slough, as indicated in Mr. Cathcart's testimony on cross-examination. He should be permitted to do this but at his own cost, as an alternative to removing the fill that he has placed in the old channel.

4. It is urged on defendant's behalf that to cause him to open up the old channel would result in his losing about four acres of improved land worth \$800, while the land of the plaintiff is unproductive and her injury comparatively trivial. Although the courts in some instances will weigh the comparative injury to the respective parties, in determining whether or not an injunction must issue, yet we are not inclined to apply this rule in the case of a continuing trespass. It is true that the injury caused so far is not great, but it is shown that plaintiff had only recently become the owner of her tract, and that she intended to improve it, but is prevented by conditions arising out of defendant's obstruction of her means of draining it. It is plain that the remedy by successive actions for nuisance would be inadequate in this case. And it is also manifest that defendant could have avoided the necessity of removing the fill which he has placed in the old channel, by digging a few feet of ditch on his own land and permitting plaintiff to use it,

instead of haggling about "royalty" for its use after the first year.

The decree of the court will be modified by permitting defendant to retain the fill he has placed in the old channel, on the condition that he construct a ditch northerly along the line between himself and plaintiff, and thence as indicated by Mr. Cathcart's testimony, adequate to carry off the water passing through the old channel from plaintiff's premises, this to be done within four months from the date of the mandate; and, in default of compliance with this order, the defendant will be required to remove completely the obstruction in the old channel, as provided in the original decree, and plaintiff shall have leave to apply to the Circuit Court at the foot of the decree herein for such order as may be necessary to compel compliance with our order. The decree as to costs and disbursements in the Circuit Court will be affirmed, and neither party will recover costs in this court.

MODIFIED.

BENSON, BURNETT and HARRIS, JJ., concur.

Argued October 7, affirmed November 23, 1920.

COX v. COX.

(193 Pac. 482.)

Divorce—Tried De Novo on Appeal.

1. On appeal from a decree denying a divorce, the cause must be tried *de novo*.

On necessity of personal violence to constitute cruelty warranting divorce, see note in 9 ANN. CAS. 1090.

On habits or course of conduct of spouse as cruelty warranting divorce, see note in ANN. CAS. 1918B, 480.

For authorities discussing the question of cruel and inhuman treatment as grounds for divorce, see notes in 18 L. R. A. (N. S.) 304; 34 L. R. A. (N. S.) 360; 65 Am. St. Rep. 69.

Divorce—Findings of Trial Judge Given Much Weight.

2. In an action for divorce where the record contains irreconcilable contradictions in the evidence upon all material points, much weight will be given to the findings of the trial judge.

Divorce—Not Discretionary, but Matter of Right.

3. A decree of divorce should be granted or withheld from the plaintiff as a matter of legal right, and not as a matter of grace.

Divorce—Wife Cruelly Treated Entitled to Divorce.

4. Where husband beats and chokes his wife and applies vile names to her, she is entitled to a divorce as a matter of legal right.

Divorce—Evidence not Showing Cruelty.

5. Evidence held not to establish husband's cruelty.

Appeal and Error—Divorce Decree Affirmed Without Prejudice to Another Suit.

6. Where divorce case was tried on short notice to both parties, and it was suggested at the hearing that the plaintiff could, if given more time, secure additional witnesses, a decree denying divorce was affirmed without prejudice to another suit, under Section 411, L. O. L.

From Curry: JOHN S. COKE, Judge.

Department 1.

This suit for a divorce was begun on October 20, 1917, by Iva A. Cox against her husband, Isham A. Cox. The parties were married in Tillamook County on September 2, 1899; and, after residing in that county "a short time," they moved to Curry County where they still live. The plaintiff was 18 and the defendant was between 22 and 24 years of age at the time of their marriage. They were without money or property when they joined hands for life's journey. The defendant admits that his wife has worked hard, at least until within the last few years; and, although the plaintiff is not willing to admit unqualifiedly that the defendant has worked hard, she does not categorically deny that her husband has been a hard worker. In despite of the unwillingness of either to concede to the other the merit of unflagging

industry for the entire period of their married life, the record fairly supports the statement that what little property the parties now own represents the accumulations of about seventeen years of hard work by each—one as much as the other. The parties own one tract of 80 acres as tenants in common; and an adjoining tract of 80 acres was homesteaded by the defendant, and the record title to this tract is in his name. There is, too, some personal property consisting of cattle, horses, and other stock as well as a few articles such as are usually found on a farm. Several cows are milked and the milk is sold to a creamery; and, so far as the record discloses, these cows furnish the only source of income for the plaintiff. From the time the parties separated in October, 1917, until April 27, 1919, the time of the trial, the plaintiff resided on the farm with all the children, except Clifford, who entered the navy, and during all that time she managed the property; and as we understand the record, the defendant is willing that the plaintiff shall continue to reside on the farm with the children and that she shall run the farm and retain the income from the premises.

There are five children living, of whom two, Clifford and John, are boys, aged at the time of the commencement of this suit, 17 and 13 years, respectively. The other three children, Leona, Gloria, and Inez, are daughters, and their ages, when this suit was begun, were 14, 6, and 3 years in the order named.

In substance, the amended complaint charges in general terms that the defendant "for many years last past" has "continuously and repeatedly" used vile language toward the plaintiff, and that he has on numerous occasions laid violent hands upon her by striking and choking her; and, in addition to this

general language found in the amended complaint, the pleading specifies three different occasions when, as she says, the defendant choked or struck her, or choked and struck her. At another specified time, July, 1917, while they were attending a party at a neighbor's home, the defendant, according to the allegations of the amended complaint, without cause and in the presence of other guests, ordered the plaintiff to leave the party "and also to leave his home and stay away from there." The plaintiff avers that at still another time, May, 1917, the defendant "flew into a passion and beat their son John" with a pair of pincers.

The plaintiff also filed a supplemental complaint in which she alleged that the defendant came to her home on December 25, 1917, "with the ostensible object of trying to arrange the property rights of the parties," and that upon their not agreeing he applied vile names to her and choked and struck her.

The plaintiff prayed for a divorce, the custody of and maintenance for the children, and alimony for herself.

The defendant answered, and denied all the allegations of cruel and inhuman treatment, and then alleged that "all troubles now and heretofore existing between" the parties "were brought on by the unwarranted acts of plaintiff toward the defendant; her relations and conduct with other men; all against the express wish and desire of this defendant, and against his counsel and advice."

The defendant left the farm when the plaintiff began this suit for a divorce, and went to work in a logging camp. He joined the army on March 5, 1918; he was injured while in the service on October 13, 1918, and, after being in a hospital for about six

months, he was finally discharged on April 19, 1919. On account of the absence of the defendant this suit was not tried until April 27, 1919, after the discharge of the defendant from the army and his return to Curry County.

The trial in the Circuit Court resulted in a decree dismissing the suit and requiring the defendant to pay the costs and disbursements. The plaintiff appeals.

AFFIRMED.

For appellant there was a brief over the names of *Mr. T. T. Bennett*, *Mr. Walter Sinclair* and *Mr. B. Swanton*, with an oral argument by *Mr. Bennett*.

For respondent there was a brief and an oral argument by *Mr. C. F. McKnight*.

HARRIS, J.—The evidence is irreconcilably contradictory. If the account which the plaintiff gives of their married life is true, then the defendant has been guilty of inexcusable cruel conduct, and, under the laws of the land, she would be clearly entitled to a divorce. If, on the other hand, his story is true, he has not been guilty of cruel and inhuman treatment, but, on the contrary, the conduct of the plaintiff has been such as would entitle the defendant to a decree of divorce, although he does not ask for a divorce. The testimony was not taken before a referee, but the witnesses testified in open court and in the presence of the circuit judge; and when the last witness had concluded his testimony the trial judge immediately announced his decision denying the prayer of the plaintiff for a divorce, and subsequently written findings were filed. Among the find-

ings of fact made by the Circuit Court are the following:

"The court further finds that plaintiff has failed to satisfactorily establish the alleged acts of cruelty or abusive language or other acts of ill treatment as alleged in her amended complaint and supplemental complaint, and has failed to establish that she has suffered any mental anguish or physical pain as alleged in said amended and supplemental complaint.

"The court further finds that the plaintiff is not without fault in the premises, but, on the contrary, is at fault, and in this connection the court finds that both plaintiff and defendant are at fault, and that their mistreatment of each other was mutual, and that plaintiff was a willing and active participant in the alleged quarrels and physical encounters alleged in said amended supplemental complaint; that defendant did use unbecoming language to the plaintiff, but that plaintiff used language toward and to the defendant of the same class and equally as forcible, and that both parties are equally and mutually at fault in this respect.

"The court further finds that plaintiff has failed to satisfactorily establish the alleged acts and conduct of the defendant toward his said children, or any of them, as alleged in said amended and supplemental complaint."

1-3. Although the cause must be tried and determined here *de novo*, yet when we find, as we do here, a paper record containing irreconcilable contradictions upon all material points, we are disposed to give much weight to the findings of the trial judge, for the reason that he saw the witnesses in action, and thus had the benefit of a kind of evidence which cannot be preserved and presented to an appellate court: *Scott v. Hubbard*, 67 Or. 498, 505 (136 Pac. 653); *Hurlburt v. Morris*, 68 Or. 259, 272 (135 Pac. 531); *Tucker v. Kirkpatrick*, 86 Or. 677, 679 (169

Pac. 117). It cannot possibly serve any useful purpose, not even a temporary one, and much less a permanent one, to give an extended recital of the testimony found in the transcript. We have, however, carefully read and considered the record. We have deliberated upon the recorded testimony fully realizing that a decree of divorce is to be granted or withheld from the plaintiff as a matter of legal right and not as a matter of grace.

4, 5. The fact that there are five children and the additional fact that the property is so situated that it cannot well be divided without material loss are circumstances which emphasize the need of care in examining the evidence, although they cannot affect the question as to whether or not the defendant has been guilty of cruel and inhuman treatment; for, if he treated her as she alleges, she is entitled to a divorce as a matter of legal right and regardless of what might happen to the property. After having examined the record with much care, and after having given to it our best thought, we find ourselves unable to say that the evidence for the plaintiff warrants us in disturbing the decree of the Circuit Court.

6. It appears that the cause was tried in the Circuit Court upon short notice to the parties, and that, although they were willing to proceed and did not object to going to trial, they had but little time for preparation; and in view of this fact, together with the added fact suggested at the hearing that the plaintiff could, if she had been given more time, have secured additional witnesses, we think that the decree should be without prejudice to another suit by the plaintiff as permitted by Section 411, Or. L. It is therefore ordered that the decree be affirmed, without costs to

either party in this court, and without prejudice to another suit. AFFIRMED.

McBRIDE, C. J., and BENSON and BURNETT, JJ., concur.

Argued at Pendleton October 25, affirmed November 30, 1920.

UNITED STATES NAT. BANK v. SHEHAN.

(193 Pac. 658.)

Mortgages—Decision for Defendant in Foreclosure Held Conclusive Against Claim of Money had and Received by Defendant.

1. Where complaint in foreclosure suit, in addition to setting forth the power of attorney under which note and mortgage were executed, clearly insufficient therefor, alleged, to show ratification of the agent's act in borrowing the money and executing the note and mortgage, that the money was applied to defendant's use and benefit, all of which benefits she accepted and retained, and the court found the equities to be with defendant, such decision was *res judicata* of plaintiff's claim, sought to be enforced in a subsequent suit, that defendant was liable for the money advanced on the note and mortgage as for money had and received.

Judgment—Opinion Looked to, to Determine Matters Concluded.

2. Where there was only a general finding, recourse may be had to the court's opinion to show what was actually decided, relative to the question of the matters as to which the decree is *res judicata*.

Judgment—Conclusive on Matters in Issue.

3. A fact properly in issue, and necessary to the determination of the case, is by the decree on the equities concluded from re-examination in a subsequent suit or action between the parties.

Judgment—Conclusive Irrespective of Form of Action.

4. Relative to a fact in issue, and necessary to the determination of the case, being finally concluded by the decision, as between the parties, it is immaterial that the form of action differs, as that the first is a suit to foreclose a mortgage, and the second an action for money had and received.

From Malheur: DALTON BIGGS, Judge.

In Banc.

This is an action for money had and received. The complaint alleges, substantially, that on September 6,

On resort to record or other evidence to determine matters concluded by judgment, see note in 44 Am. St. Rep. 562.

On application of doctrine of *res judicata* to issues in action as to which judgment is silent, see note in 6 Ann. Cas. 104.

1910, defendant had and received from one Harry R. Garrett \$5,000, which she then and there undertook and agreed to pay to the order of said Garrett one year after date, with 6 per cent interest; that said money was so had and received through defendant's agent, Charles E. Herron; that on September 6, 1910, Garrett assigned to plaintiff his interest in said money and claim therefor; that plaintiff is now the owner thereof; and that on September 1, 1911, plaintiff gave defendant notice of such assignment, and demanded payment, which was refused.

Defendant answered, denying every allegation of the complaint except the corporate existence of plaintiff, and for a further and separate defense pleaded as an estoppel and in bar of the present action the judgment of this court in the case of *United States Nat. Bank v. Herron*, reported in 73 Or. 391 (144 Pac. 661, L. R. A. 1916C, 125), attaching as exhibits to such answer copies of the complaint, answer, findings, decree and judgment on the mandate in the case last mentioned.

A general demurrer to the answer being overruled, plaintiff filed a reply, first putting at issue all the affirmative matter in the answer, and for a further and separate reply alleging:

"That the suit referred to in defendant's answer herein was, as to this defendant, a suit brought to foreclose a lien alleged to have been created by her by a certain mortgage alleged to have been executed by one Charles E. Herron as her attorney in fact and by virtue of a grant of power theretofore given him by defendant here, and was not a suit or action against this defendant to obtain a judgment at law or otherwise against her, nor to obtain any personal judgment whatever against her, except such as could be based upon her written contract.

"That plaintiff's right to foreclose in said suit against this defendant was wholly dependent upon the issue therein as to whether or not the written contract as expressed in two certain notes and the mortgage given to secure them was her 'deed,' and she contended therein only that the written contract exceeded the grant of power conferred, and for that reason she was not bound, and plaintiff for the purpose of showing that this defendant was bound thereby notwithstanding her agent may have exceeded his authority, set forth and alleged the facts shown by paragraph XVI of its amended complaint therein as set forth in paragraph 4 of her answer herein and so shown by her Exhibit A attached to said answer.

"That in the suit referred to in the answer of defendant, it was not determined or decided as a matter of law or fact that the defendant was not indebted to plaintiff for money had and received to her use and benefit, and such cause of action, and the facts upon which it is or may be based, have never been determined in the suit referred to, nor in any suit or action, it having been only held in said suit that the defendant did not authorize the execution of the notes and mortgage referred to in the answer, and did not subsequently ratify the execution thereof. That plaintiff's cause of action herein is not based upon any note or mortgage, but is solely for the purpose of recovering moneys advanced by plaintiff for the use and benefit of defendant, which in law and equity she ought to repay."

By agreement of the parties the case was tried by the court without a jury, and on August 11, 1919, the court made its findings of fact and conclusions of law in favor of the defendant. It found in effect that the plaintiff was barred and estopped from prosecuting this action by the judgment in *United States Nat. Bank v. Herron*, 73 Or. 391 (144 Pac. 661, L. R. A. 1916C, 125); further, that defendant did not receive the \$5,000 mentioned in plaintiff's complaint; and

that she had never received any benefit from said sum, or any part thereof, or promised to pay the same. It was also adjudged that said sum was not had or received from Harry R. Garrett by or through Charles E. Herron as agent for the defendant, and that plaintiff's claim was not enforceable against defendant. A general judgment was entered in favor of defendant, from which judgment plaintiff appeals.

AFFIRMED.

For appellant there was a brief over the names of *Mr. J. W. McCulloch* and *Mr. W. W. Wood*, with an oral argument by *Mr. McCulloch*.

For respondent there was a brief over the names of *Mr. W. H. Brooke* and *Mr. R. W. Swagler*, with an oral argument by *Mr. Brooke*.

McBRIDE, C. J.—1. If our decision in the case of *United States Nat. Bank v. Herron* is *res adjudicata* as to plaintiff's claim here, then the judgment in the case at bar must be affirmed. We are of the opinion that it is a bar.

For a general statement of the pleadings and facts urged in the case of *United States Nat. Bank v. Herron*, reference is made to the majority and dissenting opinions therein. To make the matter clear it may be added that the complaint in that case set forth as an exhibit the power of attorney upon which Herron proposed to act in borrowing the money, which power this court held to be insufficient to authorize him to borrow the money upon the terms which he did. That this view might be taken by the court trying the case, from a mere inspection of the complaint and exhibits, namely, the notes, mortgage, and power of attorney, must have been in the mind

of the astute pleader who drew the complaint in that case, and the pleading was therefore reinforced by the following allegation:

"That said notes and mortgage were given to secure a loan of five thousand dollars which sum in cash, lawful money of the United States of America, was on the execution and delivery of said instruments paid over to the said Charles E. Herron, and the whole thereof was thereupon by said Herron applied wholly to the use and benefit of the defendant Catherine L. Shehan, by investments in her business pursuits and to the payment of her just debts and liabilities, all in Malheur County, Oregon, all of which benefits she, the defendant Shehan, then and there accepted and retained, and she does now still have and retain the same."

The view taken by this court was substantially that the mortgage and notes tried by the standard of the power of attorney pleaded in the complaint were beyond the authority of the agent to execute, and in that view, had it not been for the additional allegation that defendant Shehan had actually received and had the benefit of the money, we should have been compelled to hold that the complaint in that case did not state facts sufficient to constitute a cause of suit. It goes without saying that if Herron, as agent for Mrs. Shehan, had exceeded his authority in the manner in which he borrowed the money from Garrett, and yet in spite of that want of authority Mrs. Shehan had received the money and used it, these would have been such acts as would have cured the original lack of authority in Herron, and rendered the notes and mortgage enforceable, and would have authorized this court to enter a decree foreclosing the mortgage. The allegation quoted was therefore not only proper, but necessary to plaintiff's cause of suit, and, being controverted, its truth or falsity was clearly put in

issue; and the determination as between these parties would be final in any tribunal wherein it might thereafter arise.

To put the argument more clearly: This court could not have found, as it did in the foreclosure suit, that the equities were with the defendant, Shehan, without finding in fact that the allegation above quoted was not sustained by the evidence. We could not have found that the equities were with the defendant, Shehan, if we had found in fact that she had received and had the benefit of the money obtained by Herron from Garrett. Practically, this was the main point in dispute outside of the question of the validity of the power of attorney to authorize the borrowing of the money upon the terms upon which the loan was effected.

That the allegation in question entered largely into the determination of the former case is indicated in both the majority opinion rendered by Justice RAMSEY and in the minority opinion by Justice BEAN, Justice RAMSEY holding, in substance, that the notes and mortgage in suit were beyond the power of Herron to execute, and that there was no evidence that Mrs. Shehan had ever received the money, or that it had been expended for her benefit, and Justice BEAN contending that Herron had acted within his authority in executing them, and alternatively that, even if such were not the case, the evidence indicated that she had the benefit of the money obtained by the loan. The dissenting opinion concludes thus:

“Viewing the transaction as delineated by the documents and evidence contained in the record, we think that any departure from the terms of the power of attorney, in the execution thereof, was impliedly ratified by Mrs. Shehan. The plaintiff’s witnesses have given their version of the important dealings, and,

if their theory or delineation was incorrect, it was incumbent upon the defendants to explain or show wherein the evidence of plaintiff was wrong. The equities are with the plaintiff. The judgment of the lower court should be affirmed."

2-4. We have referred to the opinion in the case because no findings were specifically made beyond the general one that "the equities are with the defendants," and in such cases the court may have recourse to the opinion to show what actually was decided: *Gentry v. Pacific Livestock Co.*, 45 Or. 233 (77 Pac. 115). But beyond this we take it that the rule is firmly established that a fact properly in issue between parties, necessary to the determination of the case, will be finally concluded from re-examination in any subsequent suit or action between the same parties: Freeman on Judgments (4 ed.), § 249, p. 441 et seq.; and authorities there cited; *Underwood v. French*, 6 Or. 67 (25 Am. Rep. 500); *Barrett v. Failing*, 8 Or. 152; *Glenn v. Savage*, 14 Or. 567 (13 Pac. 442); *Applegate v. Dowell*, 15 Or. 513 (16 Pac. 651); *La Follett v. Mitchell*, 42 Or. 465 (69 Pac. 916, 95 Am. St. Rep. 780); *Caseday v. Lindstrom*, 44 Or. 309, 315 (75 Pac. 222); *Wales v. Lyon*, 2 Mich. 276; *King v. Chase*, 15 N. H. 9 (41 Am. Dec. 675). Nor is the form in which the subsequent action is prosecuted material. It would be intolerable if a party, having chosen his forum and presented an issue for trial, should be permitted after defeat, by simply changing the form of his action, to relitigate the same matter in a new form of action; *Simpson v. Hart*, 1 Johns. Ch. (N. Y.) 91; *Putnam v. Clark*, 34 N. J. Eq. 532; *Phillips v. Pullen*, 45 N. J. Eq. 830 (18 Atl. 849).

The contention that plaintiff could not have recovered in the former suit on the ground that de-

fendant had actually received and used the money is plausible, but unsound. If she had so received and used the money, the court would have been compelled to hold that she had thereby ratified the act of Herron in borrowing it and executing the mortgages, and, as she was subject to the jurisdiction of the court by her answer, a decree could have been rendered, foreclosing plaintiff's mortgage, with a subsequent judgment against defendant *in personam* for any deficiency that might exist after sale of the mortgaged premises.

As before intimated, the allegation quoted was the only thing that would have prevented plaintiff's case from being dismissed on a general demurrer, as the pleadings themselves showed that the notes and mortgage were executed without authority. The conclusion here reached necessarily results in the affirmance of the judgment of the Circuit Court and renders it unnecessary to consider the objections raised by counsel to the admission of certain depositions offered by defendant.

The judgment is affirmed.

AFFIRMED.

Submitted on briefs October 1, reversed and remanded October 19, rehearing denied December 7, 1920.

PORTLAND v. O'NEILL.

(192 Pac. 909.)

Appeal and Error—Case Before Supreme Court on Complaint and Findings in Absence of Bill of Exceptions.

1. Where there is no bill of exceptions in the record, the case comes to Supreme Court on the complaint and findings.

On nature of labor or material which will support an action upon a contractor's bond, see notes in 43 L. E. A. (N. S.) 162; L. E. A. 1915F, 951.

Municipal Corporations—Statute Providing for Execution of Public Contractor's Bond Liberally Construed.

2. Section 6266, L. O. L., as amended by Laws of 1913, page 59, providing for execution of contractor's bond conditioned on payment of claims for labor and material furnished public contractor, will be construed liberally.

Municipal Corporations—Statute as to Contractor's Bond Concerns Every Relation of Contractor to Work.

3. Section 6266, L. O. L., as amended by Laws of 1913, page 59, providing for execution of bond, condition of payment of claims for material and labor furnished public contractor, concerns every approximate relation of the contractor to the work which he has contracted to do; it being the labor and material supplied for the prosecution of the work which is protected, and not some obligation incurred by the contractor which does not approximate the construction contracted for.

Municipal Corporations—Claim for Rental for Equipment While not Used Held not Within Contractor's Bond.

4. Claim for rental for equipment leased to public contractor for the period of time such equipment was not used is not within the protection of the contractor's bond, executed under Section 6266, L. O. L., as amended by Laws of 1913, page 59.

Trial—Findings must be Responsive to Issues.

5. Findings of trial court must be responsive to the issues, and, if not responsive thereto are nullities, and will not support the judgment, since such findings will not supply necessary allegations required in the pleadings.

From Multnomah: WILLIAM N. GATENS, Judge.

In Banc.

This is an action based upon a contractor's bond furnished in pursuance of Section 6266, L. O. L., as amended by General Laws of Oregon 1913, page 59. The bond was signed by the defendant, New Amsterdam Casualty Company, as surety. The cause was tried by the court without the intervention of a jury. Findings of facts were made and a judgment rendered in favor of plaintiff. The New Amsterdam Casualty Company appeals.

The complaint, in addition to setting forth the corporate character of the city and the use plaintiff and the defendant surety company, shows in substance

as follows: On the eighth day of November, 1915, the defendant, O'Neill, entered into a contract with the City of Portland for the construction of a sewer in Water Street and Mill Street of that city in accordance with the plans and specifications prepared therefor, and the ordinances of the city. The contract provided that O'Neill should promptly make payment for all labor and materials used in the prosecution of the work. O'Neill as principal and the New Amsterdam Casualty Company as surety executed their penal bond in the sum of \$14,596, conditioned that the contractor should pay all claims for labor, work, supplies, or provisions on account of all subcontractors, materialmen, laborers, and mechanics furnishing labor or material under the contract; a copy of the bond being attached to the complaint. O'Neill entered upon the work of constructing the sewer and completed the same, which was accepted by the city. It is then alleged as follows:

"Par. VII.

"That during the progress of said work the said Elliott Contracting Company rented to said J. P. O'Neill for the prosecution of said work one pile driver at the agreed rental of \$8 per day, and with the condition that said pile driver should be returned to them after the completion of said rental in as good condition as before said rental, reasonable wear and tear thereof excepted.

"Par. VIII.

"That said J. P. O'Neill retained said pile driver under said rental agreement in the said prosecution of said work for a period of 57 days; that during said time he damaged said pile driver in excess of reasonable wear and tear to the extent of \$67.60.

"Par. IX.

"That no part of said rental or said damage has been paid."

A second cause of action is set forth which is not involved upon this appeal.

A demurrer to the complaint was interposed and overruled. The Casualty Company answered, putting in issue the allegations of paragraph VII, VIII and IX of the complaint. Testimony was submitted, and the court found the facts the substance of which are stated above, finding in regard to the renting of the pile driver as follows:

"That during the progress of said work the said Elliott Contracting Company rented to said J. P. O'Neill for the prosecution of said work one pile driver at the agreed rental of \$8 per day, and with the condition that said pile driver should be returned to them after the completion of said rental in as good condition as before said rental, reasonable wear and tear thereof excepted.

"That said J. P. O'Neill retained and used said pile driver under said rental agreement in the said prosecution of said work for a period of 57 days, ending February 8, 1916."

REVERSED AND REMANDED.

For appellant there was a brief submitted over the name of *Mr. James L. Conley*.

For respondent there was a brief prepared and presented by *Mr. H. B. Nicholas, Mr. W. C. Nicholas* and *Mr. R. W. Nicholas*.

BEAN, J.—The claim of appellant is: First, that the rental of equipment within the meaning of the statute constitutes neither labor nor material and is therefore not within the bond; second, that if re-

covery can be had it must be limited to the time the equipment was actually used as distinguished from the time it was retained.

1. No bill of exceptions is contained in the record. Therefore the testimony is not before us. As submitted on behalf of plaintiff, the case comes to us upon the complaint and findings: *Miller v. Head Camp*, 45 Or. 192 (77 Pac. 83); *Farrell v. Oregon Gold Co.*, 31 Or. 463 (49 Pac. 876). Defendant contends that the facts thus set out do not support the judgment. For the basis of the action we turn to the complaint. It will be observed that the pleading shows that the contractor rented the pile driver for the prosecution of the work at the agreed rental of \$8 per day, and that he "retained" it for fifty-seven days. There is no statement therein that the equipment was used in the construction, or in any way for the prosecution of the work. In so far as that pleading discloses, a lease of the pile driver may have been executed and possession taken by the contractor and the apparatus never taken upon the works or used in any way in furtherance of the undertaking embraced in the contract and bond.

2. In following the federal cases pertaining to the expenses of machinery and means used by such a contractor who has furnished a bond provided for by the statute, where the energy procured has entered into the prosecution of the work, we have adopted a liberal rule in the construction of the statute: See *Multnomah Co. v. United States Fidelity & Guaranty Co.*, 92 Or. 146 (180 Pac. 104); *Multnomah Co. v. United States Fidelity & Guaranty Co.*, 87 Or. 198 (170 Pac. 525, L. R. A. 1918C, 685), and cases there cited. In the latter case this court said at page 206

of 87 Or., at page 527 of 170 Pac. (L. R. A. 1918C, 685):

“The line of demarcation must be drawn between labor and material furnished a contractor which are covered by such a bond and those without the pale of such an undertaking by taking into consideration the service and material in the particular case.”

3, 4. The statute requiring the bond which is incorporated into the undertaking concerns every approximate relation of the contractor to the work which he has contracted to do: *Multnomah Co. v. United States Fidelity & Guaranty Co.*, 87 Or. 198, 204 (170 Pac. 525, L. R. A. 1918C, 685); *Am. Surety Co. v. Lawrenceville Cement Co.* (C. C.), 110 Fed. 717, 721. It is the labor and material supplied for the prosecution of the work which is protected, and not some obligation incurred by the contractor which does not approximate the construction contracted to be done: *United States v. Baltimore Const. Co.*, 48 Pa. Super. Court, 502. This is not a question between the plaintiff, who was lessor of the equipment, and the contractor O'Neill, the lessee. The statute should not be interpreted so as to permit a contractor on public work to lease an equipment and use it for a short time or not at all, abandon the work without returning the rented apparatus to the lessor, and allow the rental to accumulate for a long time, and be counted as an expense protected by the statute and bond. Such is not the letter or spirit of the law. If the complaint in this case is upheld a claim like the one suggested could be made.

The facts shown by the complaint are not sufficient to support the judgment.

5. The findings of the court go further than the complaint and state that the contractor “retained

and used" the pile driver for 57 days. The defendant surety by its answer raised an issue as to the rental of the equipment. The proof is not before us. It is well settled that the findings must be responsive to the issues, as stated by Mr. Justice BURNETT in *Annand v. Austin*, 86 Or. 403, at page 410 (168 Pac. 725, at page 726), referring to findings of facts made by the court in a law action:

"Her averments having been challenged by the reply, it was incumbent upon her to prove them as laid, for it is hornbook law that the allegations and proofs must agree. It is equally axiomatic that the verdict must be responsive to the issue."

A party must recover, if at all, upon the claims asserted in his pleadings, and not upon other rights or issues that may appear in the evidence. Upon the trial of the cause by the court without a jury, findings outside of the issues made by the pleadings are nullities and will not support a judgment, not being responsive to the issues: *Eastman v. Jennings-McRae Logging Co.*, 69 Or. 1, 8 (138 Pac. 216, Ann. Cas. 1916A, 185); *Boothe v. Farmers' Nat. Bank*, 47 Or. 299 (83 Pac. 785); *Male v. Schaut*, 41 Or. 429 (69 Pac. 137); *Newby v. Myers*, 44 Kan. 477 (24 Pac. 971). Such findings will not supply necessary allegations required in the pleadings: *Ferguson v. Reiger*, 43 Or. 505 (73 Pac. 1040).

We are forced to believe that the averment of the complaint was not wanting in the respect noted by reason of oversight. We think, taking the findings in the light of the complaint, they fairly mean that the contractor "used" the pile driver for a portion of the 57 days and "retained" it for the balance of that time. The evidence is not here so that we can determine what use was made of the equipment in

the promotion of the contract work. It is asserted in appellant's brief that, according to the evidence, the pile driver was used only 11 days.

The judgment of the lower court will be reversed, and the cause remanded, with permission for the plaintiff to apply to that court for leave to amend its complaint, and for such further proceedings as may be deemed proper, not inconsistent herewith.

REVERSED AND REMANDED. REHEARING DENIED.

Argued March 9, modified and affirmed March 30, 1920.

BAIRD v. BAIRD.

(188 Pac. 699.)

Divorce—Findings of Trial Court Held of Great Weight.

1. In an action for divorce, where there was a great mass of testimony and much of the credibility of the witnesses depended upon their conduct and appearance on the stand, the findings of the trial court, who saw and heard the witnesses testifying, are entitled to much consideration.

Divorce—Statute Giving Successful Party One Third of Other's Property is Imperative.

2. Section 511, L. O. L., providing that the party securing a divorce shall be entitled to one third of the real estate then owned by the other is imperative, and a wife securing a divorce from her husband must be given an undivided one-third interest in property standing in his name, regardless of the property owned by her.

Divorce—Statute Giving Interest in Property Does not Apply to Land Outside State.

3. Section 511, L. O. L., entitling the party securing a divorce to one third of the real estate owned by the other does not apply to land outside of the state, which cannot be affected by the decree of the court.

On validity of decree in divorce action passing title to land situated in another jurisdiction, see note in 17 *Ann. Cas.* 859.

For authorities passing on the question of jurisdiction of equity over suits affecting real property in another state or county, see notes in 69 *L. R. A.* 673; 23 *L. R. A.* (N. S.) 924; 27 *L. R. A.* (N. S.) 420.

From Multnomah: GEORGE W. STAPLETON, Judge.

Department 2.

After a courtship of ten years, the plaintiff and the defendant were intermarried in the State of Illinois on April 5, 1898. There has been no issue of this union. At the time they married they had but little property. The defendant was a school teacher and had saved a few hundred dollars. The plaintiff was then an energetic, hardworking farmer boy. Through their industry and joint efforts they eventually purchased and paid for a farm of 204 acres in Elkhart County, Indiana, the title to which was taken and now stands in their joint names, each owning an undivided half interest. After living a few years on this farm and at other places, they finally sold all of the machinery, stock and equipment of the farm and moved to Portland, Oregon, where they have since resided.

While in many ways their domestic life was peculiar and was not always happy, they continued to reside together until on or about April 29, 1917, when they separated. On July 21, 1917, the plaintiff commenced this suit for a divorce, alleging facts tending to show cruel and inhuman treatment by the defendant without cause or provocation. The complaint describes certain lands in Tillamook County, Oregon, standing in the name of the plaintiff, which were purchased in 1912 for \$2,500, and city property in Portland in the name of the defendant, purchased at or about the same time, to the value of \$3,000, and avers that both properties were bought with money which was earned by the joint efforts of both plaintiff and defendant. It is then alleged that the plaintiff owns an automobile and truck business of

the reasonable value of \$2,000, in Portland, and that the defendant owns a rooming-house of the value of \$750, also in Portland; that the Indiana farm during the last six years has been rented for \$500 to \$700 annually; that the plaintiff has collected this rental for one year and the defendant has taken it for five years; that the house and barn on the Indiana farm were destroyed by fire and the defendant collected \$2,000 insurance thereon; that she has large sums of money loaned out and has a bank account of about \$5,000; and that because of their relations he permitted her to receive and handle all of such funds. He prays for a decree of divorce and an accounting.

For answer and cross-complaint the defendant denies the material allegations of the complaint, and alleges facts to show that she is entitled to a divorce on the ground of cruel and inhuman treatment. She avers that she has no income "or other means with which to support herself or prosecute her defense and cross-bill in this suit during the pendency thereof," and prays for a decree of divorce.

After a reply was filed testimony was taken in open court, and the trial judge rendered a decree of divorce in favor of the defendant, further adjudging the plaintiff to be the owner of an undivided one-half interest, in joint tenancy with the defendant, of the Indiana farm; that he was the sole owner of the automobile and truck business in Portland; that the defendant was the owner of the household goods in Portland, valued at \$300, and of a mortgage for \$2,800 upon land in southeastern Oregon; and that the plaintiff should pay the defendant \$425 as a property settlement and in addition thereto should pay her \$100 as attorneys' fees, and the sum of \$15

monthly as alimony "until defendant remarries or until the further order of this court." From this decree both parties have appealed, the defendant claiming that under the statute she is entitled to an undivided one-third interest in the Tillamook County lands and that in addition to the undivided half interest which she now owns she should be awarded an undivided one-third interest in plaintiff's undivided half of the Indiana farm. The plaintiff insists that the court erred in not entering a decree of divorce in his favor against the defendant, in awarding her permanent alimony, in allowing her \$425 as a property settlement, in confirming her title to the \$2,800 mortgage, and in general, in rendering any decree whatever in favor of the defendant.

MODIFIED AND AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. William P. Lord*.

For cross-appellant there was a brief over the names of *Mr. George Estes*, *Mr. E. M. Morton* and *Mr. J. H. Hobart*, with oral arguments by *Mr. Estes* and *Mr. Morton*.

JOHNS, J.—1. We have read the 346 pages of nauseating testimony in this suit and have not found it either interesting or instructive. It reflects no credit upon either of the litigants. Under the existing facts, this is a case in which the findings of the trial court are entitled to much consideration. The judge saw and heard the witnesses testifying, and much of their credibility depends upon their conduct and appearance on the witness-stand. The plaintiff frankly admits that early in their married life he slapped and kicked the defendant, that he does not

have any regret for what he did, and that he thinks it had a good effect. Such conduct and attitude do not favorably impress this court. Nothing is to be gained by quoting from or analyzing the testimony. Much of it is not fit to appear in print. All things considered, we approve the ruling of the Circuit Court in granting a divorce to the defendant.

2. Section 511, L. O. L., provides:

“Whenever a marriage shall be declared void or dissolved, the party at whose prayer such decree shall be made shall in all cases be entitled to the undivided third part in his or her individual right in fee of the whole of the real estate owned by the other at the time of such decree, in addition to the further decree for maintenance provided for in Section 513; and it shall be the duty of the court in all such cases to enter a decree in accordance with this provision.”

This is imperative, and where the question is raised, as in this case, by a cross-appeal, this court is bound by the terms of the statute. Under it the defendant is entitled to and should have an undivided one-third interest in the Tillamook County lands described in the complaint.

Although the testimony is somewhat conflicting, yet in equity and good conscience the defendant is not entitled to \$425 or any other sum as a property settlement, and the plaintiff should not be required to pay her any alimony, but the judgment against him for the sum of \$100 as attorneys' fees is approved.

3. Based on the statute above quoted, the defendant contends that she is entitled to an undivided one third of the plaintiff's undivided half interest in the Indiana farm. That land is beyond the jurisdiction of this court. Under similar facts in a divorce decree rendered in King County, Washington, this

point was decided by the United States Supreme Court in the case of *Fall v. Eastin*, 215 U. S. 1 (54 L. Ed. 65, 17 Ann. Cas. 853, 23 L. R. A. (N. S.) 924, 30 Sup. Ct. Rep. 3), where it was held:

“While a court of equity acting upon the person of the defendant may decree a conveyance of land in another jurisdiction and enforce the execution of the decree by process against the defendant, neither the decree, nor any conveyance under it except by the party in whom title is vested, is of any efficacy beyond the jurisdiction of the court: *Corbett v. Nutt*, 10 Wall. 464 (19 L. Ed. 976).

“A court not having jurisdiction of the *res* cannot affect it by its decree nor by a deed made by a master in accordance with the decree.”

The opinion there goes on to say:

“In such case the decree is not of itself legal title, nor does it transfer the legal title. It must be executed by the party, and obedience is compelled by proceedings in the nature of contempt, attachment or sequestration. On the other hand, where the suit is strictly local, the subject matter is specific property, and the relief when granted is such that it *must* act directly upon the subject matter, and not upon the person of the defendant, the jurisdiction must be exercised in the state where the subject matter is situated: 3 Pomeroy’s Equity, §§ 1317, 1318, and notes.”

With the modifications above indicated, the decree of the Circuit Court is affirmed, neither party to recover costs in this court.

MODIFIED AND AFFIRMED.

McBRIDE, C. J., and BEAN and BENNETT, JJ., concur.

Argued at Pendleton October 25, affirmed December 7, 1920.

COLE v. MARVIN.

(193 Pac. 828.)

Dower—Statute, Attempting to Confer Exclusive Jurisdiction on County Court for Admeasurement of Dower Irrespective of Dispute, Ineffective.

1. Despite Article VII, Section 12, of the Constitution, as amended in 1910, giving the County Court the jurisdiction pertaining to probate courts, Oregon Laws, Section 936, subdivision 8, in so far as attempting to confer exclusive jurisdiction on the County Court in all cases of admeasurement of dower, irrespective of any dispute as to the widow's right, is ineffective for such purpose, and a County Court in which a widow sought admeasurement of her dower erred in proceeding with the admeasurement after it appeared from the answer of the heirs that a dispute existed as to her right, and that the answer presented a question of fact.

Courts—"Inferior Courts" Defined, and Held Proceedings must Show Jurisdiction.

2. Used in a narrow and technical sense, the words "inferior courts" mean courts of a special and limited jurisdiction, which are created on such principles that their judgments taken alone are entirely disregarded, and the proceedings must show their jurisdiction.

Certiorari—Writ of Review Lies from Circuit Court to County Court Which Entertained Widow's Contested Proceeding for Admeasurement of Dower—"Inferior Court."

3. Any court, as the County Court, subject to the appellate jurisdiction and supervisory control of the Circuit Court under Article VII, Section 9, of the Constitution, is an "inferior court," within the meaning of the statutes, authorizing writ of review from the Circuit to the County Court, so that writ of review from the Circuit Court will lie to review the action of the County Court in entertaining a widow's proceeding, contested by heirs, for admeasurement of dower.

Courts—Holding That County Court is "Court of General and Superior Jurisdiction" Means Record Imports Verity.

4. The holding that in probate matters the County Court is a "court of general and superior jurisdiction" simply means that its record imports absolute verity, and cannot be collaterally attacked.

Judgment—Proceeding by Writ of Review is a Direct Attack on Decree.

5. A proceeding by a writ of review is a direct, and not a collateral, attack upon the decree sought to be reviewed.

From Wallowa: JOHN W. KNOWLES, Judge.

On what is direct as distinguished from collateral attack on judgment, see note in ANN. CAS. 1914B, 82.

In Banc.

This is an appeal from an order of the Circuit Court dismissing a proceeding for admeasurement of dower begun in the County Court of Wallowa County by defendant Julia A. Estes. Mrs. Estes instituted a proceeding in the County Court for the admeasurement of her dower in the land of her deceased husband. Among other matters, it was alleged, in conformity to Section 10,060, Or. L., (Section 7293, L. O. L.), that the petitioner's right to dower is not disputed by the heirs or devisees, or anyone claiming under them. Certain heirs of the deceased, plaintiffs in this court, appeared in the proceeding and answered, denying the claimant's right to dower, alleging that she had theretofore elected to receive certain provisions of the will of deceased in lieu of dower, had so notified the executor, and had accepted an installment of such provision. The County Court proceeded to hear and determine the case and to admeasure the dower. From its decision the plaintiffs brought this writ. The sole contention here is that by virtue of Section 10,060, Or. L., the County Court had no jurisdiction to admeasure dower where that right was disputed.

AFFIRMED.

For appellants there was a brief over the names of *Mr. Thomas M. Dill* and *Mr. A. Fairchild*, with an oral argument by *Mr. Dill*.

For respondents there was a brief and an oral argument by *Mr. J. A. Burleigh*.

McBRIDE, C. J.—1. It hardly requires argument to sustain the proposition that if section 10,060, Or. L., is still effective and unrepealed, the County Court

had no jurisdiction to decree the admeasurement of dower in the face of a dispute by the heirs as to the claimant's rights in the premises. This branch of the case depends upon the question of the repeal of that section. The law was originally enacted in 1854, and at the time our Constitution was adopted it was the only authority given to County Courts to admeasure dower; disputed cases being left by implication to the equity courts.

Under our original Constitution, the County Court was recognized as a court of record, having general jurisdiction to be "defined, limited and regulated by law," and by Section 12 of Article VII it was given, among other prerogatives, "the jurisdiction pertaining to probate courts." The changes that have been wrought by the amendment to Article VII adopted in 1910 need not be considered here. What is meant by "the jurisdiction pertaining to probate courts" is to be determined in a great measure by the authority exercised by such courts when the Constitution was adopted. At common law it became the duty of the heir immediately to assign or admeasure to the widow her dower in the lands of her deceased husband. If this was fairly done, the matter was ended: *Scribner on Dower*, Chapter 4, § 1. If the heir refused or made an unfair assignment, her remedy was in the common-law courts by "writ of right of dower": *Id.*, Chapter 5, §§ 1, 2. When there appeared some legal impediment to proceeding at law, the courts of equity assumed jurisdiction, and in most of the United States, where the right of assignment of dower was not provided for by statute, the usual remedy was in equity. It would appear that when the Constitution was adopted there was, if any, only a limited right in the probate courts to

admeasure dower, namely, when there was no dispute with the heirs or others interested, and the constitutional authority of the County Courts sitting in probate extended no further than to such cases.

It seems hardly probable that it was the intention of the framers of the Constitution to vest in judges unlearned in the law, as most of the county judges then were and many now are, jurisdiction to decide complicated disputes in relation to dower, which frequently involve many thousands of dollars, and especially in view of the fact that Section 12 expressly limits the civil jurisdiction of the County Courts to matters "not exceeding the amount of value of \$500." While this limitation does not in terms or meaning apply to probate proceedings, it indicates the caution with which the framers of the Constitution viewed any large grant of authority to a tribunal whose judge was usually someone unskilled in the law. Taken as a whole, we are of the opinion that the grant of jurisdiction in probate matters did not extend that authority to disputed cases of dower, and did not authorize the legislature so to extend it; such matters not being at the time of the adoption of the Constitution within the existing probate jurisdiction. In *Stevens v. Myers*, 62 Or. 372 (121 Pac. 434, 126 Pac. 29), at page 408 of the state report, we held that it was not the intent of the framers of the Constitution to include the probate of wills in the term "civil cases," and we are of the opinion that by Section 12 of Article VII, the framers thereof intended to confine the authority of the County Courts in probate matters to those existing at common law, and perhaps such other matters as had at that time been grafted on to the probate system by statute. What is said in that opinion about the

effect of Section 936, L. O. L. (Section 936, Or. L.), upon the pre-existing statutes must be considered with reference to the subject matter then under discussion, namely, the probate of wills, in which the probate courts and County Courts succeeding them have always had unlimited and exclusive original jurisdiction in the first instance; and this, as already shown, is not the case in the matter of admeasurement of dower. It would follow logically from this reasoning that Section 936, Or. L., subdivision 8, in so far as it attempts to confer exclusive jurisdiction upon the County Court in all cases of admeasurement of dower, irrespective of any dispute as to rights, is ineffective for that purpose. And this court by another line of reasoning has practically arrived at that result: *Baer v. Ballingall*, 37 Or. 416 (61 Pac. 852). This decision is followed in *Browne v. Coleman*, 62 Or. 454 (125 Pac. 278).

We are of the opinion that the County Court erred in proceeding with the admeasurement after it appeared from the answer of the heirs that a dispute existed as to the right of Mrs. Estes to dower and the answer presented a question of fact to be tried, before a decision could be arrived at. The heirs presented the question in the only way that it could be raised. If they had failed to appear, it would have been taken *pro confesso* that the statement in the petition that there was no objection by them to the admeasurement was true, and they would have been barred from contesting the proceedings thereafter. Their answer, disputing the petitioner's right to dower, was in effect a self-proving plea to the jurisdiction, where it showed upon its face facts which, if established, would have defeated Mrs. Estes' claim to dower.

2. Another important question is as to the remedy in cases where the County Court has exceeded its jurisdiction. It is claimed by the petitioner that the County Court sitting in probate is a court of general and superior jurisdiction, deriving its authority from the Constitution, and that its decisions can be brought into this court by appeal only. The contention of appellant may be syllogistically stated about as follows:

“(1) The County Court sitting in probate is a court of general and superior jurisdiction. (2) A writ of review lies only to the proceedings of inferior courts; *ergo*, such writ does not lie to review the proceedings of the County Court.”

The weakness of this syllogism lies in confusing the definition of the term “inferior” as applied to this subject matter. Used in a narrow and technical sense, the words “inferior courts” mean courts of a special and limited jurisdiction, which are created on such principles that their judgments, taken alone, are entirely disregarded, and the proceedings must show their jurisdiction: Words & Phrases, title “Inferior Courts,” citing *Ex parte Cuddy*, 131 U. S. 280 (33 L. Ed. 154, 9 Sup. Ct. Rep. 703); *Nngent v. State*, 18 Ala. 521; *Grignon v. Astor*, 2 How. (43 U. S. 319 (11 L. Ed. 283, see, also, Rose’s U. S. Notes), and other cases. But such is not the sense in which the word is used in our Constitution, where by necessary implication, if not by express language, the County Court for the purpose of the exercise of the supervisory control granted to the Circuit Courts is relegated to the class of inferior courts.

Section 9 of Article VII of our Constitution is as follows:

"All judicial power, authority, and jurisdiction not vested by this constitution or by laws consistent therewith, exclusively in some other court, shall belong to the Circuit Courts; and they shall have appellate jurisdiction and supervisory control over the County Courts, and all *other* inferior courts, officers, and tribunals."

We italicize the word "other" because of its importance in determining what was in the mind of the framers of the Constitution as to the rank of the County Court for the purposes of the exercise of that supervisory control granted to the Circuit Courts. If one should say, "I have consulted A. and other lawyers," we at once infer that A. is a lawyer. If a newspaper should say, "Smith and other thieves are in the city," the implication that it had classed Smith as a thief would be strong enough to justify an action by him for libel.

The contention of the petitioner is fully answered and negatived by the decision of this court in *Kirkwood v. Washington County*, 32 Or. 568 (52 Pac. 568), in which Mr. Justice R. S. BEAN, speaking for the court says:

"In a technical sense, an inferior court is one of inferior or limited jurisdiction, whose judgment, standing alone, does not import verity; but, in a more general sense, any court from which an appeal or writ of review will lie is inferior to the court to which its judgments may be carried for review; and it is in this sense the term is evidently used in the statute. As so used, it refers to relative rank and authority, and not to inherent quality, and was intended to include all courts and tribunals over which the Circuit Courts are given appellate jurisdiction and supervisory control by the Constitution (Article VII, Section 9): *Swift v. Circuit Judges*, 64 Mich. 479 (31 N. W. 434); *State v. Daniels*, 66 Mo. 192; *Nugent v. State*, 18 Ala. 521; 4 Enc. Pl. & Prac. 38. The mo-

tion to dismiss the writ for want of jurisdiction was therefore properly overruled, and this brings us to the validity of the proceeding sought to be reviewed."

It is true that in *Stadleman v. Miner*, 83 Or. 349, 391, 392 (155 Pac. 708, 163 Pac. 585, 983), Mr. Justice MOORE expressed a doubt as to the soundness of the opinion in *Kirkwood v. Washington County*, 32 Or. 568 (52 Pac. 568), but his remarks there are pure *dictum*, the question of the right to review proceedings of the County Court in probate matters being not even remotely involved. A careful re-examination of the decision in the *Kirkwood* case and the examination of authorities in addition to those there cited satisfies us with the correctness of Mr. Justice BEAN's opinion: *Mitchell v. Bay, Probate Judge*, 155 Mich. 550 (119 N. W. 916); *Ex parte Roundtree*, 51 Ala. 42; *Sanders v. State*, 55 Ala. 42; *Bailey v. Winn*, 113 Mo. 155 (20 S. W. 21).

3-5. In the light of the authorities we hold that any court subject to the "appellate jurisdiction and supervisory control" of the Circuit Court is an inferior court, within the meaning of the statutes authorizing the writ of review, and that since the County Court is in this class the writ of review will lie. This holding does not conflict with those decisions holding that in probate matters it is a court of general and superior jurisdiction, which simply means that its record imports absolute verity and cannot be attacked collaterally. We are imputing absolute verity to the record of the court here and receiving it at its full value. We find therefrom, and not collaterally or outside of it, that such record shows that the court was without jurisdiction to proceed to the admeasurement of dower in the face of a dispute of record as to the widow's right thereto. A proceeding by

writ of review is a direct and not a collateral attack upon the decree sought to be reviewed: *Title Abstract Co. v. Nasburg*, 58 Or. 190 (113 Pac. 2).

Finding no error, the decree of the Circuit Court is affirmed.

AFFIRMED.

Argued October 14, reversed and remanded December 7, 1920.

DIPPOLD v. CATHLAMET TIMBER CO.

(193 Pac. 909.)

Courts—Not having Jurisdiction of Subject Matter, Court can Consider No Other Question.

1. When a court has determined that it has no jurisdiction of the subject matter of an action, it cannot properly consider any other question raised in the case.

Courts—Jurisdiction of Courts Defined by Organic and Statutory Laws.

2. The organic and statutory laws of the commonwealth created the courts and defined their jurisdiction, and jurisdiction cannot flow from any other source, and the law must confer upon the courts the power to act on the subject matter on which it gives judgment.

Courts—Jurisdiction to be Determined in First Instance by Allegations in Complaint.

3. The jurisdiction of the subject matter of any controversy in any court must be determined in the first instance by the allegations in the complaint made in good faith, and does not depend on the existence of a sustainable cause of action or by the evidence subsequently adduced.

Appeal and Error—Objection to Jurisdiction may be Raised First on Appeal.

4. An objection that the court had no jurisdiction of the subject-matter of the action under the allegations of the complaint may be made for the first time on appeal, under Section 72, Or. L.

Pleading—Every Reasonable Inference Invoked to Support Complaint, not Objected to Below.

5. When a complaint reaches the Supreme Court without having been demurred to or moved against in any way, every reasonable inference or intendment should be invoked to support it.

Fixing character of property as realty or personalty by agreement, see note in 1 Ann. Cas. 312.

Right to question sufficiency of complaint for first time on appeal, see note in 3 Ann. Cas. 545.

The question as to character of building placed by consent on another's land, as real or personal property in the absence of an agreement as to its character, is discussed in a note in 14 L. R. A. (N. S.) 439.

For authorities discussing the question of costs where appellant dismisses appeal, see note in L. R. A. 1917A, 120.

Pleading—Verdict Never Supplies Material Averment.

6. While it is true that a verdict aids an informal statement of facts in a pleading, it will never supply a material averment that goes to the gist of the action.

Fixtures—Building not a Part of Realty, if Agreed It may be Removed.

7. Where a building is erected on the land of another, it is *prima facie* a part of the realty; but if erected with the understanding, express or implied, that it may be removed when desired, it is then not a part of the real estate, but personal property.

Courts—Complaint for Damages to Building Out of State Held not to Show Jurisdiction in Court.

8. A complaint in an action for damages to a shingle-mill situated in another state, constructed by plaintiff on the lands of another person, *held* insufficient to give the Circuit Court jurisdiction of the subject matter; the mill being *prima facie* real property, the action for damages to which is barred by Section 72, Or. L.

Courts—"Jurisdiction of Subject Matter" not Dependent on Ultimate Existence of Good Cause of Action.

9. "Jurisdiction of the subject matter" is the power to adjudge concerning the general question involved, and is not dependent on the ultimate existence of a good cause of action in the plaintiff in a pending cause before the court.

Costs—Party Prevailing on Appeal Held not Entitled to Costs.

10. It is a rule that a party prevailing on appeal is entitled to recover costs and disbursements; but such party will not be allowed costs, where it is not fair, right or just to exact costs from the other party.

From Multnomah: CALVIN U. GANTENBEIN, Judge.

Department 2.

This is an action prosecuted for the purpose of recovering damages emanating out of injuries by fire to certain property situated in Wahkiakum County, Washington, near the town of Cathlamet. The character of the property injured, the nature of the damages, the cause of the fire, the loss sustained by reason thereof, as claimed by the plaintiffs, is told in the following paragraphs of their complaint of record:

"That the plaintiffs, on the 16th day of April, 1917, entered into a contract with Bertha E. Martin

for the purchase of the cedar timber on the following described land situate in the State of Washington, to-wit: [description omitted.]

"That on or about the 1st day of May, 1917, the plaintiffs commenced the construction of a shingle mill on that part of said land situate in the county of Wahkiakum, State of Washington, at a point near the center of the line between said section six and seven in Township 8 North of Range 4 West of the Willamette Meridian, and completed said mill at a cost of \$4,500, and that said mill was reasonably worth said sum on the 1st day of July, 1918. That plaintiffs also erected buildings near said mill, which were reasonably worth the sum of \$200 on said 1st day of July, 1918; that plaintiffs constructed a road to said mill from the county road leading in a north-westerly direction from Oak Point, and other connecting roads, for the purpose of transporting shingles to the river landings at Oak Point and Hansen's landing on the Columbia River, at a cost of about \$1000. That plaintiffs transported a donkey engine, which they owned, to said lands of Bertha E. Martin during the month of May, 1917, for the purpose of drawing in cedar logs to said mill. That said donkey engine was at said mill on the said 1st day of July, 1918, and was, with the equipment thereon, reasonably worth the sum of \$1500.

" * * The said fire resulting from the two fires aforesaid running together was carelessly and negligently permitted by said defendants to run along and upon said mountain ridge or plateau in an easterly direction, until the same finally was carried and communicated by the prevailing westerly winds to and upon the lands of the said Bertha E. Martin during the latter part of June, 1918, and that on the 1st day of July, 1918, the said fire, being fanned and driven by a strong westerly wind, was communicated to and upon said shingle-mill, and burned the same, thereby causing damage to these plaintiffs in the sum of \$3000, and burned a part of plaintiffs' said buildings, and rendered them all use-

less, to plaintiffs' damage in the further sum of \$200, and burned the cable and sled to plaintiffs' said donkey engine, to plaintiffs' further damage in the sum of \$100, whereby plaintiffs were damaged in the total sum of \$3,300, as above set out by reason of said fire destroying their property in and about said mill.

"That in and by the terms of said contract of sale of said cedar timber from said Bertha E. Martin it was provided, among other things, that plaintiffs were to pay ten cents per thousand shingles for the shingle output of said timber, to be computed on the number of thousand shingles to be manufactured therefrom by plaintiffs. That on said first day of July, 1918, there was a large amount of cedar timber on said lands, which had been cut and thrown down, and the said cedar timber was very dry, on account of the spring and early summer being unusually dry, and a large amount of said cedar timber was burned and destroyed by said fire, to-wit, a sufficient amount thereof to have manufactured at least forty million shingles. That said cedar timber was burned and destroyed as a result of defendant's carelessness and negligence as hereinbefore set out, to plaintiffs' damage in the sum of \$6000.

"Wherefore plaintiffs pray for a judgment against each and all of said defendants for the sum of \$3300 on account of the said damage to their said mill, buildings, and donkey engine, and for the further sum of \$6000 on account of their loss by reason of the destruction of said cedar timber, and for their costs and disbursements in this action."

The Cathlamet Timber Company, a corporation, defendant and appellant, voluntarily came into court and joined issue with the plaintiffs in the court below by filing an answer, traversing the material allegations of the complaint and alleging new matter by way of defense, to which new matter the plaintiffs replied. A trial by jury was had, which resulted

in a verdict in favor of the plaintiffs in the sum of \$2,000. The defendant appealed to this court, and for grounds assigned numerous errors of the court below relating to its rulings in allowing the introduction of evidence as to certain of the defendants; in refusing to strike out the evidence of one Rudolph Finkas; in allowing the introduction of the contract between Bertha E. Martin and the plaintiffs; in allowing the testimony to show that defendant was a branch of the Portland Lumber Company, without an offer to produce the record of either corporation; in allowing evidence showing plaintiffs' damage through the burning of timber; in allowing witnesses to testify to conversations with officers of the Portland Lumber Company, for the purpose of establishing relationship with the defendant corporation; in allowing witnesses to testify to the relationship of defendant and Portland Lumber Company, without the production of the corporate records of either corporation; in overruling a motion for a nonsuit in favor of defendant; in refusing to direct a verdict; and in giving a certain instruction.

The appellant now for the first time challenges the jurisdiction of the Circuit Court of the State of Oregon in and for Multnomah County to hear and determine the cause submitted to it by the parties thereto.

REVERSED AND REMANDED.

For appellant there was a brief over the name of *Messrs. Platt & Platt*, with an oral argument by *Mr. H. G. Platt*.

For respondent there was a brief with oral arguments by *Mr. John Van Zante* and *Mr. M. H. Carter*.

BROWN, J.—1. What assignments of error, if any, we shall here consider and decide, depends upon our determination of the question of jurisdiction.

“When a court has determined that it has no jurisdiction of the subject matter of an action, it cannot properly consider any other question raised in the case”: 17 Stand. Proc. 657.

This court, speaking through Justice BONHAM, in the early case of *Evans v. Christian*, 4 Or. 375, 377, said:

“When a question of jurisdiction presents itself in any stage of a proceeding, and it is discovered that the court has no jurisdiction, either over the parties or the subject matter of the cause, it is the duty of the court, on its own motion, to refuse to proceed further. Any attempt to exercise judicial functions otherwise than as authorized by law would be a nullity, and an idle waste of time.”

To the same effect are *Evarts v. Steger*, 5 Or. 147; *State v. McKinnon*, 8 Or. 487; *White v. Ladd*, 41 Or. 324 (68 Pac. 739, 93 Am. St. Rep. 732); *Kalyton v. Kalyton*, 45 Or. 116, 127 (74 Pac. 491, 78 Pac. 332); *Rynearson v. Union Co.*, 54 Or. 181 (102 Pac. 785); *Kesler v. Nice*, 54 Or. 585, 587 (104 Pac. 2); *State v. Goodall*, 82 Or. 329 (160 Pac. 595).

It has been said that—

“Jurisdiction is the power conferred on a court, by Constitution or statute, to take cognizance of the subject matter of a litigation and the parties brought before it, and to legally hear, try, and determine the issues, and render judgment according to the general rules of law, upon the issues joined, be they either of law or of fact, or both”: Brown on Jurisdiction, § 2.

Speaking through Chief Justice FULLER, the Supreme Court of the United States has said that—

"The fundamental question of jurisdiction, first of the appellate court, and then of the court from which the record comes, presents itself on every writ of error and appeal, and must be answered by the court, whether propounded by counsel or not: *Defiance Water Co. v. Defiance*, 190 U. S. 184 (48 L. Ed. 140, 24 Sup. Ct. Rep. 63). Jurisdiction is given by law: *Clyde & R. Plank Road Co. v. Parker*, 22 Barb. (N. Y.) 323."

2, 3. The organic and statutory laws of the commonwealth of Oregon created her courts and define their jurisdiction. In fact, no other power could establish the courts of the state, nor could jurisdiction flow from any other source. The law must confer upon the courts the power to act on the subject matter upon which it gives judgment. The power or jurisdiction of the Circuit Court of the State of Oregon in and for Multnomah County to hear and determine the question as to whether or not the appellant, through negligence with fire, caused the shingle-mill described in the complaint to be injured, depends upon the existence of the fact as to whether that mill was real or personal property, and that fact must appear from the pleadings. As was said by Justice MOORE, speaking for this court in the case of *Eagle Cliff Fishing Co. v. McGowan*, 70 Or. 1, 7 (137 Pac. 766, 768):

"The authority of a court to hear and determine a cause depends upon the allegations of the initiatory pleading, and not upon the facts."

It is stated in 17 Standard Proc., page 660:

"The jurisdiction of the subject matter of any controversy in any court must be determined in the first instance by the allegations in the complaint or petition as the case may be, made in good faith, and does

not depend upon the existence of a sustainable cause of action or by the evidence subsequently adduced."

Citing *Manier v. Trumbo*, 30 Fed. Cas. No. 18,309; *Turner v. Cotton*, 123 Ark. 40 (184 S. W. 415); *Ransome-Crummey Co. v. Martenstein*, 167 Cal. 406 (139 Pac. 1060); *Lake Shore etc. R. Co. v. Clough*, 182 Ind. 178, 184 (104 N. E. 975, 105 N. E. 905); *Boone v. Poindexter*, 12 Smedes & M. (Miss.) 640; *Jersey City v. Gardner*, 33 N. J. Eq. 622; *Piekelko v. Lake View Brewing Co.*, 65 Misc. Rep. 365 (119 N. Y. Supp. 847); *Gaw v. Glassboro Novelty G. Co.*, 20 Ohio C. C. 416 (11 Ohio Cir. Dec. 32); *Eagle Cliff Fishing Co. v. McGowan*, 70 Or. 1 (137 Pac. 766); *Ridgely v. Bennett*, 13 Lea (Tenn.), 210; *Young v. Young*, 12 Lea (Tenn.), 335; *Kindell v. Titus*, 9 Heisk. (Tenn.) 727, and note 38; 17 Standard Proc., p. 675; *Geneva Furniture Mfg. Co. v. Karpen & Bros.*, 238 U. S. 254 (59 L. Ed. 1295, 35 Sup. Ct. Rep. 788; *The Fair v. Kohler Die & S. Co.*, 228 U. S. 22 (57 L. Ed. 716, 33 Sup. Ct. Rep. 410, see, also, Rose's U. S. Notes); *In re James' Estate*, 99 Cal. 374 (33 Pac. 1122, 37 Am. St. Rep. 60); *Shankle v. Ingram*, 133 N. C. 254 (45 S. E. 578).

It has been held by the Supreme Court of the State of Georgia that—

"The jurisdiction of a court to entertain a cause, and the right of the plaintiff in such cause to finally prevail, present essentially different questions; the former is determined from an inspection of the record, the other results from a consideration of the facts as established by the proof": *Young v. Hamilton*, 135 Ga. 339 (69 S. E. 593, Ann. Cas. 1912A, 144, 31 L. R. A. (N. S.) 1057).

The appellant asserts that the court in which this cause was tried was without jurisdiction, for the rea-

son that this was an action prosecuted for the recovery of damages for injuries to real property; that therefore the action was barred by the provisions of Section 42, Or. L., which reads as follows:

"Actions for the following causes shall be commenced and tried in the county in which the subject of the action, or some part thereof, is situated:

"1. For the recovery of real property, or an estate or interest therein, or for injuries to real property": *Montesano Lumber Co. v. Portland Iron Works*, 78 Or. 53, 70 (152 Pac. 244), and the many authorities therein cited.

4. The question of jurisdiction was not raised by demurrer, motion, answer or by objection to the introduction of evidence during the trial in the court below. The objection is made by appellant for the first time in this court, but under the law of Oregon he is within his legal right as declared by statute:

"If no objection be taken, either by demurrer, or answer, the defendant shall be deemed to have waived the same, excepting only the objection to the jurisdiction of the court and the objection that the complaint does not state facts sufficient to constitute a cause of action": Section 72, Or. L., and the authorities therein cited.

5, 6. We recognize the rule that when a complaint reaches this court without having been demurred to or moved against in any way, every reasonable inference or intendment should be invoked to support it: *Weishaar v. Pendleton*, 73 Or. 190, 200 (144 Pac. 401)—citing *Baker City v. Murphy*, 30 Or. 405 (42 Pac. 133, 35 L. R. A. 88); *McCall v. Porter*, 42 Or. 49 (70 Pac. 820, 71 Pac. 976); *Drake v. Sworts*, 24 Or. 198 (33 Pac. 563); *Davis v. Wait*, 12 Or. 425 (8 Pac. 356); *Bade v. Hibberd*, 50 Or. 501 (93 Pac. 364). While it is true that a verdict aids an informal state-

ment of facts in a pleading, it will never supply a material averment that goes to the gist of the action: *Philomath v. Ingle*, 41 Or. 289 (68 Pac. 803). To like effect, see *Booth v. Moody*, 30 Or. 222 (46 Pac. 884); *Savage v. Savage*, 36 Or. 268 (59 Pac. 461); *Chan Sing v. Portland*, 37 Or. 68 (60 Pac. 718).

7-9. The jurisdiction and power of the Circuit Court is invoked by a pleading alleging, with reference to the property damaged, that the plaintiffs, on the sixteenth day of April, 1917, entered into a contract with Bertha E. Martin for the purchase of the cedar timber and lands described therein, situate in the State of Washington; that in May, 1917, the plaintiffs commenced the construction of a shingle-mill on a part of said lands situate in the county of Wahkiakum, State of Washington, at a point near the center of the line between Sections 6 and 7 in township 8 north of range 4 west of the Willamette Meridian, and that they completed said mill at a cost of \$4,500. From these allegations it appears that the shingle-mill was real property. It is a rule of law that, where a building is erected on the land of another, it is *prima facie* a part of the realty: Devlin on Real Estate, § 1220A. To like effect see *Smith v. Benson*, 1 Hill (N. Y.), 176; *Leland v. Gassett*, 17 Vt. 403; *Dolliver v. Ela*, 128 Mass. 557; *Brown v. Fox*, 12 Misc. Rep. 147 (33 N. Y. Supp. 57); *Godard v. Gould*, 14 Barb. (N. Y.), 662; *Richtmyer v. Morss*, 4 Abb. Dec. (N. Y.) 55. It is equally well settled that if a building is erected upon the lands of another, with the understanding, express or implied, that it may be removed when desired, it is then not a part of the real estate, but personal property: Devlin on Real Estate, § 1220A; R. C. L., §§ 25, 26, "Fixtures." In *Roseburg Na-*

tional Bank v. Camp, 89 Or. 67 (173 Pac. 313), Justice HARRIS cites a valuable list of authorities bearing upon the subject of "Fixtures." From the allegations of the complaint, the shingle-mill constructed upon the lands of Bertha E. Martin by the plaintiffs and burned by fire on July 1st was *prima facie* real property, and an action for damages therefor in the courts of this state is barred by the provisions of said Section 72, Or. L., as the law of this state has not jurisdiction of the subject matter. Jurisdiction of the subject matter, as we have seen, is the power to adjudge concerning the general question involved, and is not dependent on the ultimate existence of a good cause of action in the plaintiff in a pending cause before the court. The power must depend upon the facts averred in the pleading, and the complaint has averred injury to real property situate, not within, but without, this state; hence this court is without jurisdiction.

The plaintiffs' demand for relief sought to recover \$3,000 for damages to the shingle-mill, outbuildings, and donkey engine, and for the further sum of \$6,000 for damages by reason of the destruction of cedar timber that had been cut and thrown down. The court instructed the jury, regarding damages by reason of the burning of the said timber, that—

"Speculative profits are not ordinarily a proper element of damages, and it appears from the contract between the plaintiffs and Mrs. Martin (Plaintiffs' Exhibit D) that the plaintiffs were obligated to pay only for such logs of Mrs. Martin as were actually made into shingles, and the plaintiffs, therefore, cannot recover in this case the profits which they would have made if such logs had not been destroyed."

We do not mean to intimate whether the court should or should not have given this instruction, but

we do assume that the jury followed it, and found no damages on account of the destruction of the timber.

A verdict in favor of plaintiffs and against defendant in the sum of \$2,000 was returned by the jury. What proportion of the verdict represents damages to the donkey engine, or injury to the outbuildings, or loss by reason of the burning of the shingle-mill, we cannot tell. However, according to the record, some part of this verdict represents damages to real property situate in the State of Washington, which it is beyond the jurisdiction of the court to award, and is invalid to that extent. Under the facts as disclosed by the record, the court cannot correct the judgment. Wherefore the judgment is ordered reversed and the case remanded, with leave to the plaintiff to apply to the lower court for permission to file an amended complaint, and for further proceedings not inconsistent with this opinion.

10. In this court, in an action at law, it is a rule that the prevailing party is entitled to recover costs and disbursements; but the rule has its exceptions, as the following precedents bear witness: *Stabler v. Melvin*, 89 Or. 226 (173 Pac. 896); *Olson v. Heisen*, 90 Or. 176 (175 Pac. 859); *Miller Lum. Co. v. Davis*, 94 Or. 507 (185 Pac. 462, 464, 1107); *Levine v. Levine*, 95 Or. 94 (187 Pac. 609). The court is of the opinion that, under the circumstances as they exist in this cause, it is not fair, right or just to exact costs and disbursements from respondents. Therefore it is adjudged that neither party have judgment for costs and disbursements in this court.

REVERSED AND REMANDED.

McBRIDE, C. J., and BEAN and JOHNS, JJ., concur.

Argued July 13, reversed and remanded September 14, rehearing denied December 14, 1920.

OBERMEIER v. MATTISON.

(192 Pac. 283; 193 Pac. 915.)

Landlord and Tenant—Covenant of Quiet Enjoyment Implied.

1. In all leases of real property, there is an implied covenant that the lessor will protect the lessee in the quiet enjoyment of the premises for the term of the lease.

Landlord and Tenant—Covenant of Quiet Enjoyment Protects Lessee from Exclusion from Possession.

2. An express or implied covenant of quiet enjoyment protects the lessee against exclusion from possession by one having a paramount title or by lessor himself.

Landlord and Tenant—Lessor Required to Place Lessee in Possession.

3. A lease of real property and covenant of quiet enjoyment involves the obligation on the part of the lessor to place the lessee in possession at the time fixed for the commencement of the term.

Pleading—Complaint After Verdict Held to Plead Fraudulent Misrepresentations.

4. In lessee's action for lessor's failure to put him in possession, in which it was claimed by lessor that lessee in consideration for specified sum had made settlement, allegations that lessee had been induced to make settlement by agreement that it should cover claims only to date of settlement, and by false statements that the premises were unoccupied, *held*, in absence of demurrer and after verdict, to plead fraudulent misrepresentations.

Landlord and Tenant—Whether Lessee's Settlement for Eviction was Fraudulently Induced Held for Jury.

5. In lessee's action for lessor's failure to put him in possession, in which it was claimed by lessor that lessee in consideration for specified sum had made settlement, question of whether settlement had been induced by fraudulent misrepresentations *held* for jury.

Landlord and Tenant—Lessor Liable for Eviction, Though He has Transferred Reversion.

6. Lessor is liable for damages for failure to put lessee in possession, though he has sold land subject to lease to third party.

Principal and Agent—Agent not Liable on Lease Made After Disclosure of Agency.

7. Agent who leases land, disclosing to lessee that he is acting as agent, is not liable to lessee for failure to put lessee in possession.

Measure of damages recoverable by tenant for failure of landlord to deliver possession of premises, see note in *Ann. Cas.* 1915B, 805.

Landlord and Tenant—Lessee's Contract With Lessor's Grantee, Stipulating Damages, not Binding on Lessor.

8. Lessee's contract with lessor's grantee, stipulating damages for termination of lease before expiration of term, was not evidence of damages recoverable against lessor for failure to put lessee in possession.

ON PETITION FOR REHEARING.

Landlord and Tenant—"Attorn" Defined.

9. To "attorn" means to agree to become tenant to one as owner or landlord of an estate previously held of another, or to agree to recognize a new owner of a property or estate and promise payment of rent to him.

Landlord and Tenant—Agreement Between Lessee and Purchaser from Landlord Held a Novation.

10. Where a lease was made, and, pending putting the tenant in possession, the land was sold subject to the lease, to which the tenant assented by making a new lease for the land and for \$100 released the original landlord, the seller accepting the sum as complete settlement for any delay in obtaining possession, etc., there was a novation eliminating the original landlord and seller, who assented, and by taking title subject to the lease and contracting for its modification the purchaser of the land became bound by the terms of the lease, which tenant accepted by joining in it.

Landlord and Tenant—Agreement Between Purchaser of Land and Tenant Induced by Fraud No Obstacle to Enforcement of Original Lease by Tenant.

11. If the making of an agreement between a tenant and the purchaser from the landlord was induced by fraud perpetrated on the tenant, the instrument is void, and constitutes no obstacle to the tenant's enforcing his previous original lease from the landlord or to his recovery from the landlord, subsequent seller of the property, on his implied covenant therein to give possession.

Landlord and Tenant—Tenant not Entitled to Destroy and also Enforce Fraudulently Procured Agreement of Attornment.

12. Where land was leased, and sold by the landlord subsequently, and the purchaser by fraud on the tenant induced him to make an agreement of attornment releasing his rights against the landlord, the mere signing of the agreement caused the tenant no damages, and all the tenant can claim as against the purchaser is to be relieved from the contract, not being able to destroy it and enforce it also.

Reformation of Instruments—Equity Alone can Reform Attornment Agreement to Restrict Release of Original Landlord.

13. If a tenant would reform his attornment agreement with the purchaser of the land so as to restrict his release of the original landlord to the damages accruing from failure to give possession and enforce it where reformed, he must seek the equity forum.

Fraud—Necessary Averments Stated.

14. A pleading alleging fraud must state that the representations were false, setting out what the truth was so that the court may draw the conclusion of falsity, that the one making them knew they were false or made them recklessly, that they were made with intent to defraud, and that the party seeking relief relied on the false statements and was thereby deceived.

From Multnomah: ROBERT G. MORROW, Judge.

Department 1.

This is an action for damages for breach of the covenants contained in a lease of real estate. The complaint alleges that on November 13, 1917, plaintiff entered into a contract with the defendant John Van Zante for the leasing of a certain tract of farm land in Washington County, of which Van Zante claimed to be the owner and in the possession. The term of the lease was three years, commencing November 30, 1917, and ending November 30, 1920. The rental for the first year was to be \$1,500, and, in accordance with the terms of the lease, it was paid at the time of the execution of the contract.

Some time before the execution of the agreement above mentioned, the defendant Mortgage Company Holland-America had foreclosed a mortgage upon the property, which had been purchased at sheriff's sale by Van Zante, as the agent of the Mortgage Company, and the conveyance was taken in the name of Van Zante, who held it in trust for his principal. The mortgagor had previously leased the land to a man named Rowe, whose tenancy expired on November 1, 1917. The latter remained in possession after the expiration of his term, and was still in possession when plaintiff's tenancy was due to begin, and, in fact, continued in possession until late in February, 1918. Some time in the month of November, 1917, and after the execution of plaintiff's lease, and while

the Rowes were still wrongfully holding over, Van Zante conveyed the property, subject to plaintiff's lease, to the defendant Esther Mattison, and on January 11, 1918, plaintiff and defendant Van Zante and Mattison met together, and at such meeting there was executed the following instrument:

"Agreement entered into this 11th day of January, 1918, by and between Esther Mattison, hereinafter called lessor, and Joe Obermeier, hereinafter called the lessee, Witnesseth,

"Whereas, the lessee heretofore on the 13th day of November, 1917, entered into a lease in writing with the predecessor in title to the lessor named herein, John Van Zante; and

"Whereas it is desired to make a modification of said lease between said lessee and the present owner of the property, the lessor named herein;

"Now, therefore, in consideration of the mutual covenants hereinafter contained, it is understood and agreed that the clause in said lease on page 2 thereof, in regard to the option on the part of the lessor to terminate the lease in case of sale, is hereby modified to read as follows:

"It is further understood and agreed between the parties hereto, that in the event of sale of said property, that this lease may be terminated on or about the first day of November, 1918, or 1919, as the case may be. That in the event of the termination of the lease about November 1, 1918, the lessee shall have the right to remove all crops grown upon said property during the growing season of 1917, and in addition thereto, shall receive back from the rental paid at the making of said lease, the sum of \$500 of said rental, and in addition thereto the sum of \$500 as fixed and liquidated damages for the termination of said lease at that time.

"That in the event that said lease is terminated about November 1st, 1919, under the option hereinabove stated, said lessee shall be entitled to receive the sum of \$300 as fixed and liquidated damages for

the termination of said lease at that time, and be entitled to remove the growing crops upon said property grown during the growing season of 1919.

"It is further understood and agreed that as a full and complete settlement of any delay in obtaining possession of said premises, and as full settlement of any controversy that might grow out of said matter between said lessee and John Van Zante, or the lessor named herein, that said lessee accepts the sum of \$100 in cash upon the signing of this modification of the lease, the receipt whereof is hereby acknowledged.

"It is further understood and agreed that, in case the lessee constructs a fence between the timber land and the slashing, that any barb wire, posts, rails or other material upon the place can be used for that purpose, without expense to lessee.

"In Witness Whereof, the parties have hereunto set their hands and seals this 11th day of January, 1918, the same being done in duplicate.

"ESTHER MATTISON. (Seal)

"JOE OBERMEIER. (Seal)

"Witnesses:

"E. L. HOLDER.

"JOHN VAN ZANTE."

Referring to the above agreement, the complaint alleges:

"That the said instrument, attached hereto and marked 'B,' contains a paragraph which reads as follows:

"'It is further understood and agreed that as a full and complete settlement of any delay in obtaining possession of said premises, and as a full settlement of any controversy that might grow out of said matter between Joe Obermeier, the lessee, and John Van Zante, the lessor, named herein, that said lessee accepts the sum of one hundred (\$100) dollars cash upon the signing of this modification of the lease, the receipt whereof is hereby acknowledged.'

"And it is further alleged by the plaintiff herein, that at the time of the execution of the said instru-

ment, that the said clause was interpreted and understood between the plaintiff and the defendants herein, and all of them, and that its meaning was that the receipt of the said one hundred (\$100) dollars mentioned therein, was in liquidation of any and all damages up to the date of the execution of the said exhibit 'B' hereto attached and for no other consideration whatsoever, and that the said lands set out in the said leasehold were at that time unoccupied, and that the plaintiff herein could at once enter upon the possession thereof, and that the inducement for the plaintiff to execute the said instrument marked 'B' was the above interpretation of said clause and the statement made by the said defendants to the plaintiff that he could take possession at once of the said premises, and that they were free of the possession of anyone excepting these defendants.

"This plaintiff further alleges that the said statements were false and untrue, and that the said premises at the date of the execution of the said modification to the said contract marked 'B' were not free from the possession of any and all persons excepting these defendants, but that the said premises were at that time occupied by other persons, and that this plaintiff has made several attempts to take possession of the said premises but has not been able to do so on account of the said premises and the buildings thereon being occupied by other persons, and that it is impossible for this plaintiff to take possession of the said premises, and has been at all times since the said 12th day of January, 1918, and that the defendant, Esther Mattison, has begun an action in forcible entry and detainer in the Circuit Court of the State of Oregon, for Washington County, against — Rowe and — Rowe, who are in possession of the said premises, and that the said action is now pending in the said court undetermined."

It is further averred that defendants induced plaintiff to delay action in the matter by repeated assurances that they would have the wrongdoers re-

moved from the premises, and by such delay he was prevented from securing other lands, and by reason thereof, and of being deprived of the use of the lands in question he was damaged in the sum of \$1,000, and that he had paid Van Zante the sum of \$1,500, as rental of the premises, under the lease, which constituted damage in that sum. There were also allegations of special damages in small amounts.

The answer of the Mortgage Company and Van Zante, after some denials, pleads affirmatively the execution of the lease, and the validity thereof, and that it clothed plaintiff with the right to take all necessary legal proceedings to obtain possession of the land. A second affirmative defense is to the effect that Van Zante had sold the land to defendant Esther Mattison, subject to the plaintiff's lease, and that she had also received a conveyance from Johnson, the mortgagor, and then pleads the execution of the agreement of January 11th, referred to in the complaint, as a settlement of all damages which might result from the delay in obtaining possession, a substitution of Esther Mattison as the landlord, and a release of these defendants from further liability or responsibility. A third separate defense is to the effect that prior to the execution of the agreement of January 11th, plaintiff had actually taken possession of the premises, and so continued in possession until some time thereafter, when, becoming dissatisfied with his bargain, he induced the Rowses to refuse to leave the premises, in order that plaintiff might have an excuse for avoiding the contract.

The defendant Mattison answered separately, in substantially the same manner as the other defendants.

Replies having been filed, there was a trial by court and jury, resulting in a verdict and judgment in favor of plaintiff and against the defendants Van Zante and the Mortgage Company, who unite in this appeal.

REVERSED AND REMANDED.

For appellants there was a brief with oral arguments by *Mr. A. H. Tanner* and *Mr. John Van Zante*.

For respondent Joe Obermeier, there was a brief and an oral argument by *Mr. Cicero M. Idleman*.

For respondent, Esther Mattison, there was a brief submitted by *Mr. Conrad P. Olson* and *Mr. Ralph R. Duniway*.

BENSON, J.—When plaintiff rested, the defendant Mattison moved for a judgment of nonsuit which was granted, and the defendants Van Zante and the Mortgage Company interposed a similar motion, which was denied. These rulings are assigned as error, and, as they involve the greater portion of the questions raised upon the appeal, we shall consider them first. The defendant Mattison's connection with the transactions here involved began when she purchased the legal title to the land involved from Van Zante, and she became further interested in the transactions resulting in this litigation when, with the plaintiff, she executed the instrument of January 11th, which is marked "Plaintiff's Exhibit B," and which will hereafter be referred to as "Exhibit B."

1. The appealing defendants, Van Zante and the Mortgage Company, insist that they were entitled to a judgment of nonsuit, primarily, for the reason that the lease, which was executed by Van Zante and plaintiff, on November 13, 1917, does not impose

upon them the duty of placing the lessee in possession. In their brief, the defendants very clearly state their contention thus:

“Where the landlord gives the tenant a right of possession of the demised premises, he has done all that he is required to do, by the terms of the ordinary lease, and in the absence of a covenant for possession, the lessee must assume the burden of enforcing such right of possession as against all persons wrongfully in possession, whether they be trespassers or former tenants wrongfully holding over.”

Upon the other hand, the plaintiff quite as clearly states his contention thus:

“If a lease contains no covenant of peaceable possession or entry, one is implied, and it is the duty of the landlord to put the tenant in possession, and to defend his possession, against all wrongful aggressions.”

It is the settled law of this state, that in all leases of real property there is an implied covenant that the lessor will protect the lessee in the quiet enjoyment of the premises for the term of the lease: *Edwards v. Perkins*, 7 Or. 149.

2. The authorities are also uniformly to the effect that an express or implied covenant of quiet enjoyment protects the lessee against exclusion from possession by one having a paramount title or by the lessor himself: 1 *Tiffany on Landlord & Tenant*, 542. But when the lessee is kept out of possession by a stranger, or a former tenant who is wrongfully holding over, without the fault of the lessor, there is direct conflict in the authorities. The two lines of decisions have been termed by some of the writers, the “English rule” and the “American rule.” The doctrine of the English decisions, as expressed in the leading case, is “that he who lets, agrees to give pos-

session, and not merely to give a chance of a lawsuit; and the breach assigned, being, that the defendant did not give the plaintiff possession," it was held that an action would lie by the lessee against the lessor: *Coe v. Clay*, 5 Bing. 440.

The leading case supporting the so-called American rule is that of *Gardner v. Keteltas*, 3 Hill (N. Y.), 330 (38 Am. Dec. 637), and formulates the rule thus:

"All that either of the covenants mentioned exact of the lessor is, that he shall have such a title to the premises, at the time, as shall enable him to give a free, unincumbered lease for the term demised. There is no warranty, express or implied, against the acts of strangers; hence, if the lessee be ousted by one who has no title, the law leaves him to his remedy against the wrongdoer, and will not judge that the lessor covenanted against the wrongful acts of strangers, unless the covenant be full and express to the purpose."

This doctrine has been followed in *Underwood v. Birchard*, 47 Vt. 305; *Pendergast v. Young*, 21 N. H. 234; *Field v. Herrick*, 101 Ill. 110; *Sigmund v. Howard Bank*, 29 Md. 324; *Cozens v. Stevenson*, 5 Serg. & R. (Pa.) 421; *Playter v. Cunningham*, 21 Cal. 229.

The doctrine announced in the English decisions has been adopted in an equal number of states, beginning with *King v. Reynolds*, 67 Ala. 229 (42 Am. Rep. 107), and followed in *Hertzberg v. Beisenbach*, 64 Tex. 262; *Hughes v. Hood*, 50 Mo. 350; *Hammond v. Jones*, 41 Ind. App. 32 (83 N. E. 257); *Sloan v. Hart*, 150 N. C. 269 (63 S. E. 1037, 134 Am. St. Rep. 911, 21 L. R. A. (N. S.) 239); *Rose v. Wynn*, 42 Ark. 257; *Herpolsheimer v. Christopher*, 76 Neb. 352 (107 N. W. 382, 111 N. W. 359, 9 L. R. A. (N. S.) 1127, 14 Ann. Cas. 399).

The question is one which is now presented for the first time in this court. The arguments presented in favor of the doctrine announced in the English decisions impress us as being more in accord with reason and practical justice. In *King v. Reynolds*, 67 Ala. 229 (42 Am. Rep. 107), the argument proceeds thus:

"A lease for a year, or term of years, is not a freehold. It is a chattel interest. The prime motive of the contract is, that the lessee shall have possession; as much so as if a chattel were the subject of the purchase. Delivery is one of the elements of every executed contract. When a chattel is sold, the thing itself is delivered. When realty is the subject, still there must be livery of seisin. Formerly, parties went upon the land, and there symbolical delivery was perfected. Now, the delivery of the deed takes the place of this symbolical delivery. Still, it implies that the purchaser shall have possession, and, without it, it would seem the covenant for quiet enjoyment is broken. Up to the time the lessee is entitled to possession under the lease, the lessor is the owner of the larger estate, out of which the leasehold is carved, and ownership draws to it the possession, unless someone else is in actual possession. The moment the lessor's right of possession ceases by virtue of the lease, that moment the lessee's right of possession begins. There is no appreciable interval between them, and hence, there can be no interregnum, or neutral ground between the two attaching rights of possession, for a trespasser to step in and occupy. If there be actual, tortious occupancy, when the transition moment comes, then it is a trespass or wrong done to the lessor's possession. If the trespass or intrusion have its beginning after this, then it is a trespass or wrong done to the lessee's possession; for the right and title to the property being then in the lessee for a term, it draws to it the possession, unless there is another in the actual possession."

3. It might well be added that it is unthinkable that a man should enter into a contract as the lessee of real property, if it could be anticipated, or within the remote probabilities, that a lawsuit would be required to enable him to enter upon the enjoyment of his term. We therefore adopt the doctrine that a lease of real property, and the covenant of quiet enjoyment, involves the obligation upon the part of the lessor to place the lessee in possession of the premises at the time fixed for the commencement of the term.

There has been some argument presented in opposition to this conclusion, based upon the theory that since, from the commencement of the term, the lessee is the only one entitled to the possession, he is the only one qualified to initiate proceedings to oust the wrongdoer. As regards this state, the answer to this contention is, that our statute upon proceedings in forcible entry and detainer is made expressly applicable to such a case, and this court has held that the landlord, after such leasing, still has such a right of possession as will enable him to maintain the action: *Twiss v. Boehmer*, 39 Or. 359 (65 Pac. 18).

4, 5. Another element is introduced into the problem by the fact that the defendant Mattison purchased the property, taking conveyances from Van Zante and from Johnson, the mortgagor, a change of ownership of which the plaintiff had notice, prior to the transactions of January 11th. The complaint and both of the answers plead the substance of the agreement of that date, but differ as to its interpretation and effect. The complaint, however, alleges that the sole consideration and inducement for the execution of Exhibit "B" consisted of an agreed interpretation that the payment of \$100, at that

time, was in liquidation of damages up to that date, and the statement of the defendants that the premises were then unoccupied, and subject to immediate, unobstructed entry by plaintiff. And it is further averred that the statements so made by defendants were false and untrue, and that the property was then occupied by others, and that it has, at all times since, been impossible for plaintiff to obtain possession of the land. These averments are not free from criticism, but we think that in the absence of demurrer, and after verdict, they may be regarded as a plea of fraudulent misrepresentation, whereby plaintiff was induced to execute the contract. The question of misrepresentation was one of fact, to be determined by the jury under proper instructions by the court. If, as a matter of fact, the execution of the instrument was free from the taint of fraud, then, as a matter of law, the agreement consists of a new contract of leasing, with an express attornment to a new landlord, and a final settlement of all claims against the original lessor; a condition which would thrust responsibility for further delay in obtaining possession of the land upon the defendant Mattison. The judgment of nonsuit in favor of the defendant Mattison prevented the proper submission of these questions to the jury, and was therefore erroneous.

6. If, upon the other hand, the jury should determine that the settlement recited in Exhibit "B" was obtained through misrepresentations, and was therefore void, the question is at once presented as to the liability of the original lessor, after a transfer of the reversion. This question is answered quite definitely in 1 Tiffany on Landlord & Tenant, 880, in the following quotation:

“Though a lessor transferring his reversionary interest loses, it seems, any right of action for subsequent breaches of the lessee’s covenants, he still remains liable on his own covenants, since one cannot, by his own act, without the consent of the other party, relieve himself from a contractual liability, the same principle being applicable here as in the case of an assignment of the leasehold, by which the original lessee is not relieved from liability on his covenants.”

This conclusion is announced also in the following cases: *Carpenter v. Pocasset Mfg. Co.*, 180 Mass. 130 (61 N. E. 816); *Jones v. Parker*, 163 Mass. 564 (40 N. E. 1044, 47 Am. Rep. 458); *Glidden v. Second Ave. Inv. Co.*, 125 Minn. 471 (L. R. A. 1915C, 190). It follows that as to the other defendants the judgment of nonsuit was properly denied.

7. Appellants urge that error was committed in refusing to give to the jury, the following requested instruction:

“The jury is instructed that it is admitted in the pleadings in this case and shown by the evidence that the defendant, John Van Zante, was acting in the matters involved in this case, as agent and trustee for the defendant Mortgage Company Holland-America, and if you find that he disclosed to the plaintiff the fact that he was acting in said transaction as such agent for said Mortgage Company Holland-America, and made said lease as such agent, then your verdict should be for defendant John Van Zante, even though you find against the other defendant, Mortgage Company Holland-America.”

This instruction is undoubtedly a correct statement of the law, as declared by this court in *Frank v. Woodcock*, 72 Or. 446 (143 Pac. 1105). If there was any evidence in the record tending to prove a disclosure of the relation of principal and agent, it was

clearly error to refuse the instruction. However, our attention is not called to any such evidence, and we have not been able to find any. It is true that the complaint and answers allege such a relation, but it is not alleged that there was any disclosure thereof prior to the commencement of this action.

The complaint alleges general damages in the sum of \$1,000 for the breach of the covenant heretofore discussed, and upon that subject the court gave the following instruction:

"If you should find from all the evidence and in accordance with the instructions already given you, that the defendants Van Zante and the Mortgage Company had broken the terms, covenants, and conditions of the lease, then the plaintiff herein would be entitled to recover whatever other damages he may have suffered by reason of the breach thereof, not to exceed the sum of one thousand dollars."

Defendants urge that this constituted error, for the reason that no evidence was offered upon the question of such damages. The plaintiff answers this assignment by calling our attention to the following paragraph of Exhibit "B."

"It is further understood and agreed between the parties hereto that in the event of sale of said property, that this lease may be terminated on or about the first day of November, 1918, or 1919, as the case may be. That in the event of the termination of the lease about November 1, 1918, the lessee shall have the right to remove all crops grown upon said property during the growing season of 1917, and in addition thereto, shall receive back from the rental paid at the making of said lease, the sum of \$500 of said rental, and in addition thereto the sum of \$500 as fixed and liquidated damages for the termination of said lease at that time."

8. It is argued that this clause of the agreement stipulates a fixed sum as liquidated damages, and, as the contract was introduced in evidence, no further evidence of damages is necessary. It is not necessary for us to consider whether or not this clause fixes the damages for any breach of the covenant, since the contract itself discloses that Van Zante and the Mortgage Company are not parties thereto, was entered into after they had parted with their interest in the reversion, and provides for a contingency with which they could have no concern, and the instruction was therefore erroneous.

There are a number of additional assignments of error, but we think that the discussion already had renders further consideration unnecessary. The judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

McBRIDE, C. J., and HARRIS and BURNETT, JJ., concur.

Denied December 14, 1920.

PETITION FOR REHEARING.

(193 Pac. 915.)

On petition for rehearing. DENIED.

Mr. C. M. Idleman for the respondent Obermeier.

Mr. Conrad P. Olson and *Mr. R. R. Duniway* for respondent Mattison.

Mr. A. H. Tanner and *Mr. John Van Zante* for appellants.

BURNETT, J.—9. The petition for rehearing is substantially a criticism of the terminology employed by Mr. Justice BENSON to characterize the new relation assumed by the plaintiff in the contract he made with the defendant Mattison as described in the complaint. The substance of the petition is that in saying the plaintiff had “attorned” to Mattison we had assumed the full consummation of the relation of landlord and tenant between Obermeier and Mattison, overlooking the requirement that the tenant for years must be established in the possession of the land, failing in which the tenancy is not accomplished. In other words, there is no landlord and no tenant until the latter takes possession, and hence no attornment is possible. This may be granted, if we are to be governed by extreme strictness in language. One definition of “attorn” according to Webster is “to agree to become tenant to one as owner or landlord of an estate previously held of another.” The Standard Dictionary says “attorn” means “to agree to recognize a new owner of a property or estate and promise payment of rent to him.” In this sense, that is exactly what Obermeier did, as portrayed in the contracts he pleads.

Contracting with Van Zante, the plaintiff had entered into what his pleading terms a lease, executory, indeed, because the implied covenant for quiet enjoyment was yet not fulfilled. At this stage he agreed to become the tenant of Mattison concerning the same estate about which he had contracted with Van Zante, which latter agreement was not yet fully executed for like reason as before.

10. As delineated in the complaint, the substance of the matter is that a lease had been made between Obermeier and Van Zante. The only remaining liability resting on the latter was to install the former

in possession. Pending this, Mattison bought the land subject to the lease already made. To this Obermeier assented by making a new lease with Mattison for the same land. He did more. For \$100, the receipt of which was acknowledged, he released Van Zante. He accepted that sum "as a full and complete settlement of any delay in obtaining possession of said premises and as a full settlement of any controversy that might grow out of said matter between said lessee and John Van Zante." It would seem that this amounts to a novation. By taking title to the land subject to the lease and contracting for the modification of that lease, Mattison became bound by the resultant agreement, which also Obermeier accepted by joining therein. The release of Van Zante by payment of \$100 exonerated him and leaves Obermeier and Mattison as the only parties concerned about anything occurring after the new lease was formulated. From his participation in the negotiations resulting in the convention between Obermeier and Mattison, from his payment of the \$100, and from the fact that the release was for his benefit, all as appears from the complaint, we must assume that Van Zante also agreed to the new relationship thus established. The result is a novation eliminating him and thenceforward involving only Obermeier and Mattison.

Of course, this result depends upon the actual validity of the contract made and signed by Obermeier and Mattison, known as Exhibit "B," attached to and made a part of the complaint. Obermeier assays to attack this on the ground of fraud. Reluctantly, as being good after verdict and in the absence of demurrer, Mr. Justice BENSON tolerated the averments of the complaint aiming to charge fraud. As there must be a new trial, it becomes

proper to discuss that feature of the complaint; for, if the litigation is to be renewed in the Circuit Court, questions will arise about the sufficiency of the pleading.

11-13. If the making of Exhibit "B" was induced by fraud perpetrated upon Obermeier, the instrument is void and constitutes no obstacle to the enforcement of the previous lease or recovery from Van Zante on his implied covenant therein. If void, Obermeier cannot recover anything from Mattison for its breach, for his relation to the land could not be affected by it. The mere signing of the instrument caused him no damage. The most he can claim as against Mattison is to be relieved from the fraudulent contract. He cannot destroy it and enforce it, too. If he would reform it so as to restrict the release of Van Zante to the damages accruing previously and enforce it as reformed, he must seek the equity forum. Such a result cannot be worked out on the law side. Van Zante and Mattison are not jointly liable, for they did not contract jointly in leasing the property. Aside from questions arising out of his agency for the mortgage company, the former is liable for all the damages accruing, unless he is excused by the release in Exhibit "B." Mattison cannot be liable except by virtue of Exhibit "B," for that is all she ever agreed to with Obermeier.

14. In pleading fraud in a case of this sort it is necessary to state that the representations were false, setting out what the truth was in order that the court may draw the conclusion of falsity; that the one making them knew they were false or made them recklessly; that they were made with intent to defraud; and that the party seeking relief from the fraud relied upon the false statements and was thereby deceived. The precedents for this doctrine

were collated anew by Mr. Justice MOORE in *Lindstrom v. National Life Ins. Co.*, 84 Or. 588 (165 Pac. 675).

If Obermeier knew the premises were in possession of another, he was not deceived by and did not rely upon the alleged representations of the defendants that the land was unoccupied. The language releasing Van Zante is plain. There are no ambiguities in it to explain, and unless fraud is properly alleged and proved, the release must stand as stated in this action at law. We cannot add new terms to it or undertake to enforce it in the would-be-amended form.

The costs and disbursements both in this court and in the Circuit Court will abide the event of this action.

The petition for rehearing is denied.

REVERSED AND REMANDED. REHEARING DENIED.

McBRIDE, C. J., and BENSON and HARRIS, JJ., concur.

Argued September 23, reversed and remanded October 19, rehearing denied December 14, 1920.

STATE v. EVANS.

(192 Pac. 1062; 193 Pac. 927.)

Jury—Provision of Constitution, Forbidding New Trial, not Applicable to Criminal Case.

1. Article VII, Section 3, of the Constitution, as amended (see Laws 1911, p. 7), declaring that in actions at law where the value in controversy shall exceed \$20, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court unless the court can say there is no evidence to support the verdict, does not apply to a criminal case, but the pre-existing procedure should be followed pursuant to Section 2.

What is cumulative evidence within rule excluding it when offered as newly discovered evidence in support of motion for new trial, see note in *Ann. Cas.* 1913D, 157.

Power of appellate court to grant new trial on ground of newly discovered evidence, see note in 19 *Ann. Cas.* 508.

Criminal Law—Essentials to New Trial on Newly Discovered Evidence.

2. Newly discovered evidence to justify a new trial must be such as would probably change the result, it must have been discovered since the trial, it must be such as could not have been discovered before the trial by the exercise of due diligence, it must be material, it must not be cumulative merely, and it must not be merely impeaching.

Criminal Law—Defendant's Knowledge of Occurrence will not Prevent New Trial, Where He Did not Know of Evidence.

3. That defendant knew of the occurrences, newly discovered evidence of which he relied on for new trial is no ground for denying the motion; knowledge of the existence of a fact and of the evidence to prove it being entirely different.

Criminal Law—Newly Discovered Evidence Held not "Cumulative Evidence," and to Justify New Trial.

4. In a prosecution for robbery, where defendant relied on alibi, newly discovered evidence of a traveler, tending to show that defendant was not at the place of crime on the date specified, as well as other newly discovered evidence, showing defendant's whereabouts in a different place by reason of the fact that on the day of the crime he motored with one witness and did work for other witnesses, etc., is not cumulative within Section 700, L. O. L., defining cumulative evidence as additional evidence of the same character to the same point, and warrants new trial, even though defendant must have known of his whereabouts and might have testified thereto, since, even if he did, there is a great difference between the testimony of an interested witness and that of a disinterested witness.

Criminal Law—Defendant Held to have Shown Diligence so as to be Entitled to New Trial on the Ground of Newly Discovered Evidence.

5. Where defendant, who relied on alibi, inquired of his employers concerning evidence of his whereabouts at the time of the alleged offense, and they disclaimed knowledge of anything in his benefit, evidence of records showing defendant's whereabouts, discovered after the employers' recollections were refreshed by the investigation of another, is ground for new trial, despite the contention defendant did not exercise diligence.

Criminal Law—Where Trial Court Erroneously Determined It had No Discretion to Grant New Trial, Denial will not be Upheld.

6. Where the trial court, under a mistaken view of the precedents, erroneously determined that, under Article VII, Section 3, of the Constitution, as amended (see Laws 1911, p. 7), it had no discretion to grant a new trial on the ground of newly discovered evidence, the denial cannot be upheld on the theory that the discretion of the trial court will not be reviewed.

Criminal Law—Evidence of Prior Identification of Defendant Inadmissible as Self-serving Declaration.

7. In a prosecution for robbery, evidence of the sheriff that the prosecuting witness identified defendant in jail was inadmissible, being in the nature of a self-serving declaration.

Criminal Law—Permission to Introduce in Rebuttal Evidence in Chief Should not be Arbitrarily Granted.

8. Under Section 132, L. O. L., providing that after plaintiff has introduced evidence on his part and has concluded, and defendant has done the same, the parties may then respectively introduce rebutting evidence only, unless the court permits them to introduce evidence upon the original cause of action, permission to the state to introduce on the rebuttal evidence in chief should not be arbitrarily granted out of hand.

Criminal Law—Evidence as to Identification of Prosecuting Witness not Rebuttal.

9. In a criminal prosecution, where the prosecuting witness testified to his identification of defendant and defendant to his protestations of innocence, etc., testimony by the sheriff as to the identification was inadmissible as rebuttal, and should on objection be excluded.

Robbery—Evidence of Defendant's Protestation of Innocence Inadmissible as Showing Identification.

10. While, under Section 727, L. O. L., declaring that evidence may be given of a declaration or act of another in the presence and within the observation of a party, and his conduct in relation thereto, the state might introduce evidence of defendant's strong protestation of innocence when the prosecuting witness identified him as a robber, it would clearly be immaterial to introduce it as showing identification of defendant by the prosecuting witness.

Criminal Law—Weight of Evidence for Jury.

11. The weight of the evidence in a criminal prosecution is exclusively for the jury.

ON PETITION FOR REHEARING.

Criminal Law—Order Denying Motion for New Trial Only Reviewable on Appeal from Judgment.

12. An order denying motion for a new trial is not appealable, and, if reviewable at all, can only be reviewed by an appeal from the judgment against which the motion is directed.

Criminal Law—Denial of Motion for New Trial, Based on Insufficiency of Evidence, not Assignable as Error.

13. The denial of a motion for a new trial cannot be assigned as error, and will not be reviewed on appeal, where the motion is based on an alleged insufficiency of the evidence.

Criminal Law—Sufficiency of Evidence Reviewed Where Motion for Nonsuit or Directed Verdict is Made.

14. Accused is always afforded an opportunity to question the sufficiency of the evidence by moving for a nonsuit at the close of the state's case in chief or by moving for a directed verdict when both parties have rested and in that manner preserve the record so that upon appeal the question of the sufficiency of evidence may be reviewed.

Criminal Law—Denial of Motion for New Trial on Ground of Newly Discovered Evidence may be Assigned as Error.

15. An order, denying a motion for a new trial, is assignable as error, and will be reviewed on appeal, if the motion is based upon newly discovered evidence.

Criminal Law—Denial of Motion for New Trial for Newly Discovered Evidence Disturbed Only When There is Abuse of Discretion.

16. The ruling of a trial court denying motion for new trial upon the ground of newly discovered evidence will not be disturbed unless there has been an abuse of discretion, but an accused is entitled to the exercise of a judicial discretion by the trial judge.

From Jackson: FRANK M. CALKINS, Judge.

Department 1.

The defendant was convicted of the crime of assault and robbery being armed with a dangerous weapon, and has appealed.

REVERSED AND REMANDED.

For appellant there was a brief and an oral argument by *Mr. Gus Newbury*.

For the State there was a brief and an oral argument by *Mr. G. M. Roberts*, District Attorney.

BURNETT, J.—In substance, the theory of the state is as follows: On Saturday, September 13, 1919, about 5:40 o'clock in the afternoon, the prosecuting witness, White, was sitting in his taxicab near the Grants Pass Hotel at Grants Pass, Oregon. At that hour the defendant engaged the owner of the vehicle to convey him and his wife across Rogue River. They went at once to the railway station, where they took on board the defendant's wife and their baggage, consisting of a grip and satchel, and proceeded on their way, White seated on the front seat, driving, and the defendant and his wife on the back seat. After having crossed the river and arrived at what is

known as Savage Rapids, the defendant presented a pistol at the driver's head, compelled him to get out and go with the defendant into the brush, where the latter robbed him of \$27 in money, forced him to get into the car and drive to a point in the hills near Jacksonville, in Jackson County, where the defendant took White into the brush, bound and gagged him, got into the car, and drove rapidly away with his wife. Arriving at Jacksonville, the defendant bought some gasoline in the presence of several men, disappeared, and was not heard of until he was arrested at Klamath Falls some time in October following. He was brought back to Medford, and as the result of an inquiry in the office of the district attorney he was discharged for want of sufficient evidence, and returned to Klamath Falls. He was indicted by the grand jury of Jackson County, and arrested in November. This indictment was dismissed, and a new one afterwards returned upon which he was tried.

The state produced the evidence of several witnesses, who testified to seeing the defendant and his wife loitering about the railway station at Grants Pass during the afternoon of September 13th; also a former acquaintance of the defendant's father, whom he met at Grants Pass, and who claims that this occurred on September 13th.

On his part the defendant admits that he and his wife were at Grants Pass at the station during part of the day on September 9th, four days before the date of the alleged crime, and that he met his father's acquaintance on the 9th, but contends that he left Grants Pass on train No. 53, going to Medford on the afternoon of the 9th, and was never again at Grants Pass. He had sought work at his trade as an auto-

mobile mechanic at Grants Pass, but without success. He secured employment at Medford, and claims that he was engaged at the latter place continuously from about September 10th to 17th.

Sundry assignments of error are presented by the abstract, but the one principally relied upon is that of the court in refusing to grant a new trial on the ground of newly discovered evidence. Unquestionably, there was sufficient evidence to justify the verdict, for the prosecuting witness was very positive in his identification of the defendant as the man who robbed him. The defendant had the benefit of the testimony of Dewey Jones, who gave evidence to the effect that on September 9th he boarded the train out of Grants Pass en route to Medford in company with the defendant, and rode with him as far as the latter place, where the defendant and his wife left the train; also that of the witness Currie, who was book-keeper for the Hines & Snyder garage at Medford, and who testified to the fact of paying the defendant part of his wages as an employee of that concern on September 13th, in the shape of two small checks which had been paid in by customers of the establishment. It was admitted by the prosecution also that the defendant registered at the Hotel Holland at Medford on September 9th. Still further, there was the testimony of the witness Kribs, a grocer, and Kizer, his clerk, to the effect that about half-past 5 in the afternoon of the 13th the defendant purchased some groceries at Medford, and Kribs assisted him in carrying them to a house he had rented in that town.

As newly discovered evidence, the defendant offers the testimony of Milom Jones, to the effect that he left Grants Pass on a train No. 54, going north from

Grants Pass, about 6 o'clock in the evening of September 13th; that during the course of that afternoon he was at the railway station several times, endeavoring to engage accommodations on board that train, but that he did not see the defendant or his wife about there at all, although he had the opportunity to see them if they had been there. The defendant also propounds the testimony of W. E. Thomas, to the effect that on Saturday evening, September 13th, between half-past 6 and 7 o'clock he was riding with the defendant and the witness' father and mother at Medford. Again, it is proposed by the motion for a new trial to offer the evidence of Sam L. Sandry and Jerome Hilbert, to the effect that since the trial they have examined into their business records of dealings with the Hines & Snyder garage at Medford, and that the former is prepared to testify that on September 13th the defendant was working at the garage and did some work on a certain Chalmers car belonging to the Blue Ledge Mining Company. The testimony of I. A. Snyder, as shown by his affidavit in support of the motion for a new trial, is to the effect that between the time of the defendant's arrest and the trial, the latter had inquired of him if there was any evidence within the affiant's knowledge, aside from the records of the garage, that would show that at the time of the commission of the crime the defendant was at Medford, and he was unable to give him any information, but since then he has discovered, as the result of investigation made by the affiant Sandry, that there was a transaction in which the defendant was concerned, about the purchase of a vacuum tank from another business house at Medford for the affiant's firm, that would show conclusively that he was at Medford at the time the crime was committed. There is a great wealth of affidavits,

along similar lines, of different witnesses who are prepared to give detailed circumstances tending to show that the defendant was at Medford, as he claims, when the crime was committed, but which are too numerous to be noticed further in this opinion.

1. The opinion of the trial judge in denying the motion for new trial is set out in the brief of the district attorney, and discloses the ruling theory upon which the motion was denied, to the effect that since the adoption of the amended form of Article VII of the state Constitution (see Laws 1911, p. 7), the granting of a new trial is not discretionary with the trial court. The opinion cites the cases of *Webb v. Isensee*, 85 Or. 148 (166 Pac. 544), and *Archambeau v. Edmunson*, 87 Or. 476 (171 Pac. 186). These were both civil cases, the former an action for slander and the latter for damages for the alleged breach of an agreement. Both of these opinions were written by the late Justice MOORE. In the Archambeau case he used this language:

“The rule formerly obtained in Oregon that the granting or denial of a motion for a new trial was a matter resting within the discretion of the trial court, whose action upon the application would not be disturbed upon appeal, except in case of a manifest abuse of what should have been an exercise of sound judgment. Article VII, Section 3, of the organic law of this state, as amended, declares: ‘In actions at law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of this state, unless the court can affirmatively say there is no evidence to support the verdict’: Gen. Laws Or. 1911, p. 7. Since that amendment became operative it has been held that the granting of a new trial was not a matter of discretion; that an order for the rehearing of a cause could not be sanctioned except when the court had com-

mitted some error, which if properly excepted to or seasonably called to the attention of the court and the motion denied would have been sufficient cause for a reversal of the judgment if it had been brought up for review; and that under such circumstances the trial court upon motion or *sua sponte* possessed adequate power, and was authorized within the prescribed time, to correct the error which it had committed by granting a new trial"—citing authorities.

As applied to the case in hand, we note that Section 2 of the constitutional amendment reads thus:

"The courts, jurisdiction, and judicial system of Oregon, except so far as expressly changed by this amendment, shall remain as at present constituted until otherwise provided by law. * * "

We find in Section 3 that:

"In actions at law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of this state, unless the court can affirmatively say there is no evidence to support the verdict. Until otherwise provided by law, upon appeal of any case to the Supreme Court, either party may have attached to the bill of exceptions the whole testimony, the instructions of the court to the jury, and any other matter material to the decision of the appeal. If the Supreme Court shall be of opinion, after consideration of all the matters thus submitted, that the judgment of the court appealed from was such as should have been rendered in the case, such judgment shall be affirmed, notwithstanding any error committed during the trial; or if, in any respect, the judgment appealed from should be changed, and the Supreme Court shall be of opinion that it can determine what judgment should have been entered in the court below, it shall direct such judgment to be entered in the same manner and with like effect as

decrees are now entered in equity cases on appeal to the Supreme Court. * * "

It will be observed in the first place that there has been no change in the judicial system of the state affecting the present case, except that which may be found in the amendment itself. That clause of the third section upon which the *Webb v. Isensee* case and that of *Archambeau v. Edmunson* were based, relates to actions at law "where the value in controversy shall exceed twenty dollars." A criminal case, although an action at law as defined in *State v. Carr*, 6 Or. 133, is not one where the value in controversy exceeds \$20. Indeed, no value can be placed upon a man's liberty. The cases referred to, therefore, are not precedents governing the consideration of a criminal charge. The design of the clause referred to was to take from the trial court the authority to set aside a verdict on the ground that the preponderance of evidence was against the decision of the jury, as taught in such cases as *Serles v. Serles*, 35 Or. 289 (57 Pac. 634). Under the former régime, as illustrated by that case, it was permissible to set aside the verdict of the jury when in the judgment of the court it was against the great preponderance of the evidence. This is no longer the rule under the Constitution, in actions to which the amended form of the organic act is applicable.

2. We feel at liberty, therefore, under sanction of Section 2 of the constitutional amendment, to proceed under the judicial system as it formerly existed to inquire if the motion for a new trial should have been sustained. It is said in *State v. Hill*, 39 Or. 90 (65 Pac. 518), that:

"Newly discovered evidence which will justify a court in setting aside a verdict and granting a new

trial must fulfill the following requirements: '(1) It must be such as will probably change the result if a new trial is granted; (2) it must have been discovered since the trial; (3) it must be such as could not have been discovered before the trial by the exercise of due diligence; (4) it must be material to the issue; (5) it must not be merely cumulative to the former evidence; (6) it must not be merely impeaching or contradicting the former evidence.'"

3-5. The crux of the present situation is to determine whether or not the proposed testimony is "merely cumulative." In our judgment, the showing on the other points is amply sufficient. If believed by the jury which shall re-examine the question of fact, it would seem that the testimony set forth in the affidavits supporting the motion for a new trial would so effectually establish the alibi as to convince the most doubting that the result of the new trial would be different.

It is argued that the defendant was aware of all of the occurrences set forth in the affidavits. But it is plain from the showing that, although he thus had knowledge of the different transactions detailed, he was not aware of the evidence available to prove them. There is a palpable distinction between the existence of a fact and the evidence to prove it to others. That the proposed testimony is clearly material to the issue goes without saying. The controversy centers around the question of whether the evidence is "merely" cumulative. An illustration of this phrase is found in *State v. Hill*. The defendant was there accused of the crime of stealing a mare. His defense was that on a certain occasion in company with his two brothers he met a man who was in possession of the mare in question, and traded a gray mare for her. His brothers testified to this occur-

rence in his defense. His motion for a new trial was based upon affidavits showing that he had at length, since the hearing, discovered the whereabouts of the man with whom he had traded, who would testify that they exchanged horses at that time and place, without any further circumstance or detail of the occurrence. The two brothers of the defendant had already testified to that identical transaction, and the testimony of the proposed witness offered no more than what had already been narrated in detail.

The best writers on the subject of cumulative evidence find it extremely difficult to apply the definition in practice. By Section 700, L. O. L., we learn that "cumulative evidence is additional evidence of the same character to the same point." A writer in the note to *Spencer v. State*, 69 Tex. Cr. Rep. 92 (153 S. W. 858, 46 L. R. A. (N. S.) 903), after discussing the question says:

"It would therefore appear that the rule that a new trial will not be granted to permit the introduction of cumulative evidence has more sound than meaning; the real test being that applied to all newly discovered evidence, whether cumulative or not, namely, the probability of a different verdict; and that the only significance of the cumulative character of evidence lies in the improbability that evidence of the same character as that which a jury has by its verdict already rejected would lead to a different result."

Our statute, Section 174, L. O. L., grants a new trial for "newly discovered evidence, material for the party making the application, which he could not with reasonable diligence have discovered and produced at the trial." Commenting on a similar statute of the State of Washington, Mr. Justice DUNBAR, in *State v.*

Stowe, 3 Wash. 206 (28 Pac. 337, 14 L. R. A. 609), reviewed the difficulties attending the application of the definition of cumulative evidence to a concrete case and said:

“But, after all is said and done, any attempt to lay down rules of construction for this section is simply an enlargement in words of the idea so compactly expressed in the statute. If it is material testimony, it can only be material because it would tend to strengthen the applicant’s case, and probably lead to different results; and if it is material, and applicant could not have discovered it with reasonable diligence, common justice demands that he should have the benefit of it.”

In a sense, all evidence is cumulative that tends to establish the same general result. It may be accumulated or piled together on one side of the scale of justice, whether it be evidence directly to the same identical point, as if one witness would, parrotlike, repeat the story of another, or whether it relates to totally different circumstances; yet it would not all be cumulative within the restrictive meaning of the statute. *State v. Hill*, 39 Or. 90 (65 Pac. 518), illustrates the kind where one witness would repeat precisely what another had already told, but it is not open to the objection of being cumulative if witnesses detail different circumstances all tending to the same result. As said by Mr. Justice GRANGER in *Boggess v. Read*, 83 Iowa, 754 (50 N. W. 43):

“In a literal sense that is cumulative that adds to what already is. Now, if a new trial is to be refused where it would be cumulative of evidence that tends to establish the ultimate facts or issues in the case, then the statute as to new trials for newly discovered evidence would be practically inoperative, because the application would always be because of cumulative evidence. Such a construction, so far as

we know, has never been given in the application of the law as to cumulative evidence. It is urged upon us, on the authority of *First Nat. Bank v. Charter Oak Ins. Co.*, 40 Iowa, 572, that, whenever the evidence is additional, then it is cumulative; but we think the case is authority only for a rule that, when the evidence is additional to other evidence on the same point, as distinguished from an ultimate fact, it is cumulative in the statutory sense. Now, as a defense in this case, the defendant attempted to show lewdness or adulterous conduct. On the trial already had, there was evidence of particular facts tending to show lewdness. Additional evidence as to such particular facts would be cumulative. But the showing of newly discovered evidence is that witnesses will testify to other acts from which the ultimate fact of lewdness may be found. The defendant purposes to prove acts not before attempted to be established. Such evidence we do not regard as cumulative, within the rule for denying a party a new trial."

Closing Section 226, 1 Spelling on New Trial and Appellate Practice, the author sums up the distinction in these words:

"Upon all of which authorities and many more that might be cited, it is conclusive that, all other objections to newly discovered evidence being absent, the fact that it is cumulative is unimportant; and that it is not necessary for the intelligent and correct decision of a motion for a new trial in any case, where newly discovered evidence is relied on, to consider its cumulative character, except in aid of a decision of the question whether there is a probability of a different result upon a retrial."

In *Fellows v. State*, 114 Ga. 233 (39 S. E. 885), the defense was that of alibi, and in granting a new trial the Supreme Court of that state held that evidence of detached facts not mentioned in the testimony at the

trial is not cumulative merely because they tend to prove the same ultimate fact, namely, that the defendant was not present at or a participant in the commission of the crime. In *People v. Vanderpool*, 1 Mich. N. P. 157, we find this language:

“The facts are different, though they establish the same conclusion. * * The evidence offered not being of the same fact, but of a different fact with the same logical bearing, cannot be considered as cumulative.”

In *Fletcher v. People*, 117 Ill. 184 (7 N. E. 80), a new trial was granted on discovery of a written statement made by one of the state's witnesses concerning the affair, different from his testimony at the trial. That case was probably decided on the ground that this was evidence of a different kind from that given at the trial, namely, written, as opposed to oral, testimony. In *People v. Lapique*, 136 Cal. 503 (69 Pac. 226, 15 Am. Crim. 512), a new trial was granted to the defendant, so that he could introduce the admission of the prosecuting witness that he himself had signed the note which the defendant was accused of forging. *State v. Lowell*, 123 Iowa, 427 (99 N. W. 125), was a prosecution for bastardy, and it was held that evidence was not cumulative which fixed the dates of the prosecutrix' going to and leaving the defendant's employ longer than the period of gestation before the birth of her child, although other witnesses had testified to those dates. In that case the prosecutrix had given the dates between which she had been in the employ of the defendant, so as to include the time of her disgrace. The witness offered in support of a new trial fixed the time of her going there by the date of his mother's birthday, coupling that date with the circumstance of her entering the de-

fendant's employ. This the court held to classify it as corroborative, rather than cumulative, evidence. In *State v. Tyson*, 56 Kan. 686 (44 Pac. 609), the defendant was prosecuted for statutory rape of his minor daughter. The witnesses for the state, Sadler and his wife, identified them as being *in flagrante delicto* near the roadside when the Sadlers came up, and said that when they were discovered the father and daughter scrambled into a spring-wagon and rode ahead of the Sadlers until they came to the road, where they turned off. The daughter, testifying for the defendant, denied their presence there at the time or at all. It was held that the testimony of one who met the spring-wagon, and said the defendant and his daughter were not in the vehicle, was not cumulative, but corroborative. *State v. Bailey*, 94 Mo. 311 (7 S. W. 425), was a case where the indictment charged assault with intent to kill. One of the principal questions in the case was: Who began the affray? It was held that evidence of uncommunicated threats of the injured party was not cumulative to the evidence of the defendant that the prosecuting witness made the first assault. In *Able v. Frazier*, 43 Iowa, 175, the plaintiff sued the defendant to recover for lumber delivered. The defense was payment. The plaintiff contended in his testimony that the payment made had been applied on another account for some lumber used by the defendant in the building of a schoolhouse, and although the defendant testified directly that the payment was not on the schoolhouse lumber, yet testimony of the school officers to the same effect in support of an application for a new trial was held not cumulative. *Wayt v. Burlington etc. Ry. Co.*, 45 Iowa, 217, held that the admission of a party is not cumulative to direct testimony to the same effect.

Waller v. Graves, 20 Conn. 305, was an action by Graves against Waller for libel. Merwin, who originally wrote the article, testified that the words "rapacious creditor" were not in it when Waller signed it. The testimony of Averill, editor of the newspaper in which the libel was published, to the effect that he inserted the objectionable words without authority or knowledge of Waller, was held not cumulative. After discussing the subject, the court used this language:

"There are often various distinct and independent facts going to establish the same ground, on the same issue. Evidence is cumulative which merely multiplies witnesses to any one or more of these facts before investigated, or only adds other circumstances of the same general character. But that evidence which brings to light some new and independent truth of a different character, although it tends to prove the same proposition or ground of claim before insisted on, is not cumulative within the true meaning of the rule on this subject; as in the present case, Merwin testified only that the libel, as printed and published, was not like the paper written by him and signed by Waller, in the particular referred to. But now appears a new fact, entirely independent of the testimony of Merwin—one which did not exist at the time Merwin speaks of, which is that another person, without the knowledge or consent of either Waller or Merwin, inserted the objectionable words into the article which appeared in the newspaper."

In *Murray v. Weber*, 92 Iowa, 757 (60 N. W. 492), evidence of declarations of plaintiff's agent contrary to what he swore to at the trial was held not to be either cumulative or impeaching. The controlling reason of the decision seems to be that the declarations of the agent are those of his principal, which

need not be called to his attention before giving them in evidence from the mouth of another witness, and hence were original, rather than cumulative or impeaching, evidence. In *Means v. Yeager*, 96 Iowa, 697 (84 N. W. 513), although evidence of admissions was given at the trial, evidence of other and distinct admissions was held not cumulative, not being an attempt to give additional testimony as to those already appearing in evidence; that is to say, if one witness has given evidence of an admission made at a particular time and place, the evidence of other witnesses about that same admission would be cumulative, but they would not be so if the evidence related to another and distinct admission made at a different time and place: See, also, *German v. Maquoketa Bank*, 38 Iowa, 368; *Goldsworthy v. Town of Linden*, 75 Wis. 24 (43 N. W. 656); *Bigelow v. Sickles*, 75 Wis. 427 (44 N. W. 761). The principle seems to be that that testimony is cumulative which relates only to the precise detailed circumstance already narrated by another witness, but it is not cumulative if it relates to other circumstances, although they tend to prove the same general result.

Applied to the instant case, it seems that the testimony of Milom Jones, although negative in its character, that he was about the Grants Pass station frequently during the afternoon of September 13th, and that neither the defendant nor his wife was there, is a new and independent circumstance of which the defendant should have the benefit. The same is true of the testimony of W. E. Thomas, who, at the time of the trial, as the record discloses, was at San Diego, California, to the effect that he was riding with the defendant between half-past 6 and 7 o'clock on the evening of September 13th at Medford, discloses a

new and independent circumstance. Likewise, the testimony of Sandry respecting the repairs on the Chalmers car made by the defendant on the afternoon of September 13th, and his trying out the same on the next morning, relates to an independent circumstance. So, also, the testimony of other witnesses about the purchase of and settlement for the vacuum tank and its gasket, mentioned in the evidence, details new circumstances arising from and connected with that transaction, all of which would be favorable to the defendant. It is true that the defendant participated in all of these occurrences, and that according to the hard technical rule he should have remembered them and testified to them. But even if he did, it is plain common sense that the evidence of disinterested witnesses would be evidence of another character, differentiated by its very disinterestedness from the testimony of the defendant himself, which confessedly is from the mouth of a witness interested in his own behalf. It is therefore not evidence of the same character. In justice the two classes of testimony should be distinguished, and the defendant should have the benefit of the declarations of disinterested witnesses.

In the case of *State v. Ausplund*, 86 Or. 121 (167 Pac. 1019), cited in support of the denial of the motion, the defendant knew, not only the circumstance which he proposed to offer in evidence on a new trial, but knew the witness by whom he could prove the same, and that she was within the reach of a subpoena, but excused her from testifying, from motives of delicacy. *Stern v. Volz*, 52 Or. 597 (98 Pac. 148), was a civil case involving the whereabouts of the defendant at the date he was said to have executed an instrument at North Bend, Oregon. There was testimony tending to show that on the same day he was

at Boise, Idaho. The new witness did not propose to testify any more than to the bare fact that on that date he was at Boise, Idaho, without mentioning any particular circumstance to support his bald declaration. In *State v. O'Donnell*, 77 Or. 116 (149 Pac. 536), the newly proposed evidence was plainly impeaching in its character. As to diligence, we find the defendant's case discloses that he was inquiring of his employers about evidence respecting his presence at Medford, and that they disclaimed knowledge of anything in his benefit, until after the trial their recollection was refreshed by the investigation of Sandry.

6. It is said that the decision of the trial court on a motion for a new trial will not be disturbed except for an abuse of discretion, and that such an abuse must plainly appear. Basing his opinion, as he did, upon the civil cases of *Webb v. Isensee* and *Archambeau v. Edmunson*, which are characterized by the dispute involving more than \$20 in value, the learned trial judge abused his discretion by abjuring it. Under the judicial system as it existed before the amendment, which is preserved by that very amendment in the absence of legislation changing it, he did have discretion to grant a new trial for what is clearly corroborative, and not merely cumulative, evidence. Instead of assuming that discretion, he was misled by the precedents cited into denying it; and, as we view the testimony offered in support of the motion for a new trial, we think justice would require a new trial, because the additional showing of alibi is so strong that it is reasonably probable the result of a second trial would be favorable to the defendant.

7-9. There are other errors assigned which ought not to recur at a new trial. The prosecuting witness went to Klamath Falls after the defendant was arrested there and in jail, and in company with the sheriff identified the defendant as the man who robbed him, giving in detail the conversation between himself and the defendant in the jail. It seems from the bill of exceptions that the defendant's counsel made no objection to the admission of this testimony in chief. The defendant also gave his version of the meeting between himself and the prosecuting witness at the jail at Klamath Falls, to the effect that he strongly protested that he did not rob the witness and had never seen him before. But after the case of the defendant was finally rested, the state called the sheriff of Klamath County, and had him testify to the effect that the prosecuting witness identified the defendant as the man who robbed him, all over the objection of the defendant that it was immaterial, irrelevant, not competent and not rebuttal; and this is noted as one of the assignments of error. The issue was whether the defendant robbed the prosecuting witness. Applicable to that issue was the question whether at the trial the prosecuting witness could identify the defendant as the man who committed the crime. Whether he identified him at any other time or place, either before or after the trial, would be immaterial, and in a sense a self-serving declaration. It ought not to have been admitted in the first place, although no objection was made to it. It was clearly not rebuttal, and it had the effect of giving the state the last chance to testify in support of its case. In *State v. Hunsaker*, 16 Or. 497 (19 Pac. 605), it was held that in a criminal case the state cannot be permitted to withhold a part of its evidence

in chief and then introduce it in rebuttal after the defendant has rested his case. Like doctrine is laid down in *State v. Minnick*, 54 Or. 86 (102 Pac. 605). In the instant case there was no request for the court to reopen the case, as in *State v. Merlo*, 92 Or. 678 (173 Pac. 317, 182 Pac. 153). In prescribing the order of proceedings on trial, Section 132, L. O. L., indeed says that after the plaintiff has introduced evidence on his part and has concluded, and the defendant has done the same, "the parties may then respectively introduce rebutting evidence only, unless the court, for good reasons and in furtherance of justice, permit them to introduce evidence upon the original cause of action, defense or counterclaim." Some good reason should appear for separating the state's case into parts and giving a portion in chief and another in rebuttal. Permission should not be granted arbitrarily out of hand. The objection should have been sustained on the ground that the testimony was not rebuttal. The evidence as to identification at Klamath Falls should have been rejected.

10. We are not unmindful of the principle laid down in Section 727, L. O. L., that evidence may be given of "a declaration or act of another, in the presence and within the observation of a party, and his conduct in relation thereto." Under this section, if the state chose to introduce as part of its case the defendant's strong protestation of his innocence in the conversation in the jail at Klamath Falls, it might do so, but it would be clearly immaterial to introduce it as showing identification of the defendant by the prosecuting witness.

11. We are of the opinion that the defendant should have had the benefit of the evidence set out in the affidavits in support of his motion for a new trial,

for the reasons that it was not cumulative, and that, in our judgment, it would probably lead to a different result in the end. By this we do not intimate what should be the future verdict. That is exclusively for the jury, acting under proper instructions from the court, after having received only legal evidence for its consideration. The fact of the defendant's guilt or innocence has not been nor will it be otherwise re-examined than by a jury trial.

For the reasons indicated, the judgment is reversed, and the cause remanded to the Circuit Court for a new trial.

REVERSED AND REMANDED.

McBRIDE, C. J., and BENSON and HARRIS, JJ., concur.

Denied December 14, 1920.

PETITION FOR REHEARING.

(193 Pac. 927.)

The State, as respondent, files petition for rehearing.

REHEARING DENIED.

Mr. I. H. Van Winkle, Attorney General, and *Mr. G. M. Roberts*, District Attorney for Jackson County, for the petition.

Mr. Gus Newbury, *contra*.

HARRIS, J.—The state has petitioned for a rehearing. It is contended that an order denying a motion for a new trial is not appealable, cannot be assigned as error and cannot be reviewed by this court; and in support of this contention the state cites *State v. Pender*, 72 Or. 94, 108 (142 Pac. 615),

and *State v. Frasier*, 94 Or. 90, 107 (180 Pac. 521, 184 Pac. 848).

12. An order denying a motion for a new trial is of course not appealable; for, if reviewable at all, it can only be reviewed by an appeal from the judgment against which the motion was directed. The order denying the motion is reached by appealing from the judgment rendered in the case.

The Code expressly recognizes the right of a disappointed litigant to ask for a new trial, if for any of the reasons specifically enumerated by the statute a substantial right of such litigant has been materially affected; and among the several reasons we find the following:

“Newly discovered evidence, material for the party making the application, which he could not with reasonable diligence have discovered and produced at the trial”: Section 174, subd. 4, Or. L.

Subdivision 6 of this section authorizes the court to grant a new trial because of an “insufficiency of the evidence to justify the verdict or other decision, or that it is against law.”

Section 174, Or. L., has been brought to the attention of this court many times. The following constitute a considerable number, though not all, of the many precedents in which Section 174 has been noticed: *Bowen v. State*, 1 Or. 271; *State v. Fitzhugh*, 2 Or. 227, 236; *State v. Wilson*, 6 Or. 429; *Hallock v. Portland*, 8 Or. 29, 30; *State v. McDonald*, 8 Or. 114, 118; *State v. Becker*, 12 Or. 318, 319 (7 Pac. 329); *Kearney v. Snodgrass*, 12 Or. 311 (7 Pac. 309); *State v. Roberts*, 15 Or. 187, 198 (13 Pac. 896); *State v. Clements*, 15 Or. 237, 243 (14 Pac. 410); *Beckman v. Hamlin*, 23 Or. 313, 319 (31 Pac. 707); *State v. Foot You*, 24 Or. 61, 70, 73 (32 Pac. 1031, 33 Pac. 537);

Elder v. Rourke, 27 Or. 363, 367 (41 Pac. 6); *State v. Childers*, 32 Or. 119, 128 (49 Pac. 801); *State v. Gardner*, 33 Or. 149, 152 (54 Pac. 809); *McCormick Harvest Machine Co. v. Hovey*, 36 Or. 259, 260 (59 Pac. 189); *State v. Crockett*, 39 Or. 76, 81 (65 Pac. 447); *Crossen v. Oliver*, 41 Or. 505, 508 (69 Pac. 308); *Ruckman v. Ormond*, 42 Or. 209, 212 (70 Pac. 707); *First Nat. Bank v. McCullough*, 50 Or. 508, 515 (93 Pac. 366, 126 Am. St. Rep. 758, 17 L. R. A. (N. S.) 1105); *Manning v. Portland Shipbuilding Co.*, 52 Or. 101, 103 (96 Pac. 545); *Fassett v. Boswell*, 59 Or. 288, 290 (117 Pac. 302); *Stark v. Epler*, 59 Or. 262, 268 (117 Pac. 276); *Abercrombie v. Heckard*, 68 Or. 103, 104 (136 Pac. 875); *In re Sneddon*, 74 Or. 586, 591 (144 Pac. 676); *White v. Geinger*, 70 Or. 81, 82 (139 Pac. 572); *Wallace v. Portland, R. L. & P. Co.*, 88 Or. 219, 225 (159 Pac. 974, 170 Pac. 283).

13, 14. Although there may have been an occasional discordant note among the many reported opinions of the court, yet it must now be accepted as an established rule that the denial of a motion for a new trial cannot be assigned as error, and will not be reviewed on appeal where the motion is based upon an alleged insufficiency of the evidence. This established rule is simply the natural result of conditions. The fact of the insufficiency of the evidence in any given case can always be known before the cause is submitted to the jury; and hence the defendant is always afforded an opportunity to question the sufficiency of the evidence, for he may move for a nonsuit at the close of the plaintiff's case in chief, or move for a directed verdict when both parties have rested, and in that manner preserve the record, so that upon appeal the question of the sufficiency of the evidence may be reviewed.

Quite a different situation is created, however, where the motion for a new trial is based upon newly discovered evidence. In such a case the trial has been completed and the verdict of the jury has been returned; and the very purpose of allowing the motion for a new trial is to afford a remedy for a fact situation which becomes known after verdict, and could not with reasonable diligence have been known before the completion of the trial. The basic difference between the two classes of cases is discussed and recognized in *State v. Hill*, 39 Or. 90, 96 (65 Pac. 518, 520), for there this court said:

“While the rule is well settled in this state that the action of the trial court on a motion for a new trial on account of any matter within the knowledge of a party prior to the submission of the cause to the jury is not reviewable on appeal, and therefore cannot be assigned as error (citing cases), yet when anything occurs after the cause has been submitted which tends to subvert justice, or shows that a fair trial has not been had, and which by the exercise of reasonable diligence on the part of the defeated party could not have been ascertained or prevented, his affidavit and motion for a new trial, predicated upon such matters, presents a question which the court should weigh and decide with care, and whenever its judgment thereon is manifestly wrong it will be reviewed on appeal.”

The controlling principle which is announced in *State v. Hill*, 39 Or. 90, 96 (65 Pac. 518), is also recognized and approved in *Ruckman v. Ormond*, 42 Or. 209, 212 (70 Pac. 707); *Goodeve v. Thompson*, 68 Or. 411, 417 (136 Pac. 670, 137 Pac. 744); *Stern v. Volz*, 52 Or. 597, 598 (98 Pac. 148); *Colgan v. Farmers & Mechanics' Bank*, 59 Or. 469, 475 (106 Pac. 1134, 114 Pac. 460, 117 Pac. 807). See, also, *Tucker v. Flouring Mills Co.*, 13 Or. 28, 34 (7 Pac. 53);

Mitchell & Lewis Co. v. Downing, 23 Or. 448, 454 (32 Pac. 394); *Barclay v. Oregon-Wash. R. & N. Co.*, 75 Or. 559, 561 (147 Pac. 541); *State v. Mims*, 36 Or. 315, 327 (61 Pac. 888); *State v. Magers*, 36 Or. 38, 53 (58 Pac. 892); *State v. Smith*, 43 Or. 109, 118 (71 Pac. 973); *Territory of Oregon v. Latshaw*, 1 Or. 146; *Lander v. Miles*, 3 Or. 40, 43; *State v. Ausplund*, 86 Or. 121, 139 (167 Pac. 1019); *Portland & O. C. Ry. Co. v. Sanders*, 86 Or. 62, 77 (167 Pac. 564); *Crossen v. Oliver*, 41 Or. 505, 508 (69 Pac. 308); *Fassett v. Boswell*, 59 Or. 288, 290 (117 Pac. 302); *State v. Parr*, 54 Or. 316, 324 (103 Pac. 434).

15, 16. Frankness compels the admission that complete harmony does not run throughout all the decisions dealing with Section 174, Or. L., for there are many precedents which contain statements which, standing alone and literally construed, undoubtedly support the position now taken by the state; and, moreover, it must be conceded that there are a few decisions which cannot be logically harmonized with the holding in *State v. Hill*. However, any broad and comprehensive language found here and there among the many precedents should be read in the light of the facts under discussion; and, when such language is so read, it will appear, in despite of some discordancy, whether real or seeming, that it is now the rule that an order denying a motion for a new trial is assignable as error, and will be reviewed on appeal if the motion is based upon newly discovered evidence. Of course, the ruling of a trial court will not be disturbed unless there has been an abuse of discretion. A party is entitled to the exercise of a judicial discretion by the trial judge; and, if there has not been the exercise of such a discretion, the party has, to

that extent, failed to receive that which the law gives him.

In the instant case the motion was based upon a cause materially affecting the substantial right of the defendant. The trial court was of the opinion that under the provisions of Article VII, Section 3 of the present state Constitution it was without power to disturb the verdict of the jury, and for that reason the Circuit Court declined to examine into the merits of the motion for a new trial. We did not remand the cause with directions to the Circuit Court to pass upon the motion for a new trial; but, since in our view a refusal by the trial court to grant a new trial would in the face of the showing made by the defendant be an abuse of discretion, we directed the granting of a new trial. In other words, even if the trial court had, after an examination of the motion and affidavits filed by the defendant, refused to grant a new trial, we would have held that such refusal was tantamount to the abuse of judicial discretion.

We adhere to our former opinion. The petition for a rehearing is denied.

REVERSED AND REMANDED FOR NEW TRIAL.
REHEARING DENIED.

Argued October 19, peremptory writ allowed December 14, 1920.

LADD & TILTON BANK v. FRAWLEY, COUNTY
TREASURER.

(193 Pac. 916.)

Constitutional Law—Constitution "Self-executing" When Intended to Go into Immediate Effect.

1. A constitutional provision is "self-executing," when there is manifest intention that it should go into immediate effect, and no ancillary legislation is necessary to the enjoyment of the right given or the enforcement of a duty imposed, even though such

right may be better or further protected by supplementary legislation.

Constitutional Law—Constitutional Amendment Increasing Limit for Road Debt is Self-executing.

2. The amendment to Article XI, Section 10, of the Constitution, adopted in 1919, whereby the limit of indebtedness which a county could incur with approval of its electors was increased from 2 per cent to 6 per cent of its assessed valuation, was self-executing, though it was worded as a restriction on the power of the counties to incur indebtedness greater than 6 per cent, especially in view of the argument in the voters' pamphlet that the amendment gave the counties such power, and the fact that the legislature in submitting a later similar amendment apparently regarded the provision as self-executing.

Constitutional Law—Statutes Inconsistent With Amendment are Void.

3. Even though a constitutional amendment is not self-executing as to all its provisions, it is self-executing to the extent that it nullifies all existing statutes or portions thereof which are inconsistent with its provisions, as well as such statutes as may be subsequently passed.

Counties—Legislative Restriction on Bonded Debt Limit Repealed by Constitutional Amendment.

4. The provision of Laws of 1913, Chapter 103, Section 19, that no bonded indebtedness issued under the act should exceed 2 per cent of the assessed valuation of the county, was merely to call attention to the then existing limit prescribed by the Constitution, not to fix a separate limit by legislation, since the whole act clearly indicates that it was intended to provide a mode for the issuance of bonds by the counties, and that provision was repealed impliedly by the amendment to Article XI, Section 10, of the Constitution, in 1919, which increased the limit from 2 per cent to 6 per cent.

Constitutional Law—Curative Amendment not Construed as Dependent on Legislation.

5. A constitutional amendment designed to cure a defect in the law or to remove an existing mischief should never be construed as dependent for its efficacy and operation on legislative will.

Counties—Statute for Election on Bond Issue Repealed by Constitutional Amendment Only as to Limit of Indebtedness.

6. Since a statute is impliedly repealed by a subsequent statute or constitutional provision only to the extent that it is clearly repugnant thereto, Laws of 1913, Chapter 103, providing for the method of election in counties for the issuance of bonds, was repealed by the amendment in 1919 to Article XI, Section 10, of the Constitution, increasing the limit of indebtedness which counties might incur only to the extent that the statute prescribed such limit, and bonds could therefore be issued to the amount limited by the amendment after proceedings in conformity with the other provisions of that statute.

Original proceeding in Supreme Court in *mandamus*.

In Banc.

This is an original proceeding in *mandamus*. An alternative writ has been issued herein, and return thereto made by the defendant, from which it appears as follows:

On October 11, 1919, at a special election called and held in Union County, Oregon, there was submitted to the voters of the county the question of the issuance of bonds in the sum of \$1,498,000 by Union County for the purpose of raising money to be used for the construction and maintenance of permanent roads in the county; the bonds being in a sum not in excess of 6 per cent of the assessed valuation of the property in the county. The incurring of the proposed indebtedness was at such election approved by a majority of those voting on the question, there being 2,184 votes cast in favor of the bonds and 841 against the same. The indebtedness of the county, exclusive of that incurred by such bonds, was nothing. All of the proceedings for calling and holding such election, which were detailed in the return to the writ, were in regular form as prescribed by the statute.

On June 19, 1920, the County Court of Union County sold and delivered to the Union Bridge Company and to the Road Builders' Equipment Company, both of Portland, Oregon, \$60,000 par value of bonds so authorized at a price of not less than par and accrued interest, the bonds maturing in numerical order at the rate of \$30,000 on the fifteenth day of January, in each of the years 1925 and 1926, and bearing interest at the rate of $5\frac{1}{2}$ per cent per annum, payable semi-annually on the fifteenth day of January

and July of each year, principal and interest payable at the fiscal agency of the State of Oregon in New York City. Thereafter on the fifteenth day of July, 1920, interest coupon No. 1 on the bonds sold became due and payable, and under the provisions of Chapter 46, General Laws of Oregon 1911, the defendant, as treasurer of said county, was required to remit to the fiscal agency in the form of check or draft, payable in New York, at least fifteen days before the maturity of said coupons, sufficient funds for the redemption thereof, which remittance the county treasurer failed, neglected, and refused to make, and still declines and refuses so to do.

On or about July 2, 1920, Ladd & Tilton Bank purchased \$10,000 par value of the aforementioned bonds with all coupons attached thereto, including the coupon maturing July 15, 1920, and thereafter presented to the fiscal agency for payment coupons numbered 1 in the aggregate sum of \$137.50, which coupons the fiscal agency refused to pay, and still refuses to pay, upon the ground that the county treasurer has not transmitted the funds for payment thereof. It is alleged in the writ that the bonds were issued and sold and the proceeds thereof appropriated by Union County to its proper purposes, and petitioner herein and others similarly situated are *bona fide* and innocent purchasers for value before maturity and without notice.

The return to the writ, after setting forth in detail the proceedings for calling and holding the bond election and the result, the assessed valuation of the property in the county and the sale of the bonds mentioned, states the reason why the defendant has not paid the interest on the bonds thus: Under the provisions of Section 19, Chapter 103, General Laws of

Oregon 1913, page 175, the amount of bonds issued by any county may not exceed 2 per centum of the total assessed valuation of the property of the county, and that the issue of such bonds in the sum of \$1,498,000 by Union County was in excess of the 2 per cent limitation and for approximately 6 per centum of the total assessed valuation of the property in the county and therefore void. The constitutional amendment submitted to the people by the legislature and adopted at a special general election held on June 3, 1919, amending Section 10, Article XI, of the Constitution of Oregon and allowing counties to bond themselves to the extent of 6 per centum of their assessed property valuation, has not been made effective for bonding purposes either by the legislature or the people of Oregon. The return also refers to the opinion in the case of *Hawley v. Anderson*, 99 Or. — (190 Pac. 1097). A demurrer is interposed to the answer and return to the writ.

It is but fair to say that the officers of Union County and of the other counties interested are anxious and willing to uphold the bonds issued, if the law will permit. Counsel for several counties have joined in the briefs.

PEREMPTORY WRIT ALLOWED.

For petitioner there was a brief over the names of *Mr. Prescott W. Cookingham* and *Messrs. Teal, Minor & Winfree*, with an oral argument by *Mr. Cookingham* and *Mr. Wirt Minor*.

For Yamhill County there was a brief and an oral argument by *Mr. Roswell L. Conner*, District Attorney.

For Coos County there was a brief submitted over the name of *Mr. John F. Hall*, District Attorney.

For Crook County there was a brief over the names of *Mr. N. G. Wallace* and *Mr. Willard H. Wirtz*, District Attorney, with an oral argument by *Mr. Wallace*.

For Lane County there was a brief and an oral argument by *Mr. L. E. Bean*.

For Jackson County there was a brief submitted over the name of *Mr. G. M. Roberts*, District Attorney.

For Union County there was a brief over the name of *Messrs. Crawford & Eakin*, with an oral argument by *Mr. Thomas H. Crawford*.

For the Oregon Highway Commission there was a brief and an oral argument by *Mr. J. M. Devers*, Assistant Attorney General.

There was a brief and an oral argument by *Mr. O. D. Eby*, *Amicus Curiae*.

For the defendant, there was a brief and an oral argument by *Mr. John S. Hodgin*, District Attorney of Union County.

BEAN, J.—No question is raised in regard to the regularity of the proceedings had in the issuance of the bonds. The questions for determination are: (1) Was the amendment to Section 10, Article XI, of the Constitution, in 1919, raising the debt limitation of counties for building and maintaining permanent roads to 6 per cent of the assessable value of the property in the counties, in effect when the bonds in question were issued? This involves two questions: (a) Was the amendment self-executing? and (b) If

not, was there any law then upon the statute books putting the amendment into execution? (2) Did the amendment of 1919 to Section 10, Article XI, of the Constitution, amend or repeal Section 19 of Chapter 103, of the Laws of 1913, by necessary implication?

Section 10, Article XI, of the Constitution, as originally adopted in 1859, reads as follows:

“No county shall create any debts or liabilities which shall singly or in the aggregate exceed the sum of five thousand dollars, except to suppress insurrection or repel invasion; but the debts of any county at the time this constitution takes effect shall be disregarded in estimating the sum to which such county is limited.”

The original Section 10 was a limitation upon the creation of debts or liabilities by the counties as such. It is worthy of note that during all of the time this section remained unchanged no legislative enactment was placed upon the statute books authorizing counties to contract debts within the limitation of the \$5,000. It is apparent that the section was construed to be both an inhibition and a permission to counties, without further legislative authority, to contract debts within the prescribed limit. As said by this court, speaking through Mr. Justice BURNETT in *Andrews v. Neil*, 61 Or. 471, at page 474 (120 Pac. 383, 123 Pac. 32):

“Every county has always had the power to create debts for the purpose of building permanent roads, provided the voluntary liabilities of the county should not be increased thereby to exceed \$5,000.”

In 1910 the people of the state by an initiative measure amended Section 10, Article XI, of the Constitution to read thus:

"No county shall create any debts or liabilities which shall singly or in the aggregate exceed the sum of five thousand dollars, except to suppress insurrection or repel invasion, or to build permanent roads within the county; but debts for permanent roads shall be incurred only on approval of a majority of those voting on the question": General Laws of Oregon 1911, p. 11.

Again in 1912, by means of the initiative, the people of the state amended Section 10 by adding thereto the following words:

"And shall not either singly or in the aggregate with previous debts and liabilities incurred for that purpose exceed two per cent of the assessed valuation of all the property in the county": General Laws of Oregon 1913, p. 9.

In order to furnish election machinery by which the amendment could be put into execution, and elections held and bonds issued by the counties for the construction of permanent roads, Chapter 103, General Laws of Oregon 1913, was enacted by the legislature. The title of the act, which indicates its scope and purpose, is as follows:

"To authorize the county courts of the State of Oregon to issue and sell bonds or county warrants of the county for the purpose of building and maintaining permanent highways within the respective counties, and to provide a sinking fund for the purpose of retiring the bonds at maturity; to authorize the several counties of the State of Oregon to hold special elections for the purpose of submitting to the voters of the county the question of the issuance of bonds and warrants; and generally to provide a complete manner of procedure for the issuance of county bonds for the purpose of the building, construction and maintenance of permanent highways."

After detailing all of the provisions indicated by the title of the act, Section 19 provides as follows:

“No bond shall be issued under this act that will in the aggregate, together with the bonds outstanding, and the bonds offered to be sold, be in excess of two (2) per cent of the assessed valuation of the county at the time the bonds are issued.”

Several counties availed themselves of the authority granted by the Constitution, and in conformity to the procedure provided by Chapter 103 held elections and authorized the issuance of bonds for building permanent roads, and in this manner expended large sums of money, approximating the 2 per cent limitation. In 1919, in answer to a demand for a further construction of good roads, and in order to be able to raise funds therefor, the legislature of that year submitted to the people a further amendment to Section 10, Article XI, of the Constitution, which was regularly adopted, and reads as follows:

“No county shall create any debts or liabilities which shall singly or in the aggregate, with previous debts or liabilities, exceed the sum of \$5,000, except to suppress insurrection or repel invasion or to build or maintain permanent roads within the county; and debts for permanent roads shall be incurred only on approval of a majority of those voting on the question, and shall not either singly or in the aggregate, with previous debts and liabilities incurred for that purpose, exceed six per cent of the assessed valuation of all the property in the county”: Oregon Laws, Vol. 1, p. 170.

1. The rule is stated in 12 C. J., Section 106, page 729, thus:

“Constitutional provisions are self-executing when there is a manifest intention that they should go into immediate effect, and no ancillary legislation is necessary to the enjoyment of a right given, or the en-

forcement of a duty imposed. That a right granted by a constitutional provision may be better or further protected by supplementary legislation does not of itself prevent the provision in question from being self-executing; nor does the self-executing character of the constitutional provision necessarily preclude legislation for the better protection of the right secured. A constitutional provision which is merely declaratory of the common law is self-executing. A constitutional provision designed to remove an existing mischief should never be construed as dependent for its efficacy and operation on legislative will."

2. If a county could create general indebtedness for any purpose under the original Section 10, Article XI, of the Constitution, as has been the ruling and policy of the state since 1859, then it must follow as a necessary sequence that when the \$5,000 limitation was changed, and upon approval of a majority of the legal voters voting on the question, a county might incur an additional indebtedness for the purpose of building permanent roads, the authority to do so must be considered as granted by the amendment, or, in other words, the amendment adopted is permissive. Therefore the authority of the people of the county to issue road bonds was not granted by Chapter 103, Laws of 1913, but by the Constitution.

While it may be that a portion of the amended section as it now reads is prohibitive, that part which reads, "debts for permanent roads shall be incurred only on approval of a majority of those voting on the question, and shall not either singly or in the aggregate, with previous debts and liabilities incurred for that purpose, exceed 6 per cent of the assessed valuation of all the property in the county," must be considered as conferring authority. Although it is to a certain extent stated in the negative, by changing

the limitation, it has granted authority for the creation of indebtedness up to the prescribed limit. This construction is emphasized by the fact that, when the last amendment of 1919 was submitted to the people there appeared in the voters' pamphlet an affirmative argument setting forth the effect and provisions of the amendment, wherein the reason given why the amendment should be supported, and the provisions of the measure, were stated as follows:

"(1) The measure is intended to grant to counties the option of voting bonds up to 6 per cent of assessed valuation for road purposes. It is a matter left entirely with the particular county. As to whether or not, after the passage of this measure, a county votes bonds, will be no concern of any other county.

"(2) Many counties desiring more funds for road work are asking that you consent that they burden themselves if they so desire. Your affirmative vote on this measure does not prejudice you in the least, nor cost you a penny.

"(3) If, in the opinion of a county, good roads are a paying investment and badly needed, is it not your duty to vote to allow that county to put the question to its people?

"(4) A private corporation cannot do business with only 2 per cent of its capital available; much less can a public corporation make necessary improvements on that amount; 6 per cent is little enough.

"(5) This is a purely local option measure; no county need assume burdens unless it desires.

"Appeal is made to the sense of fairness of voters to grant the opportunity and privilege for which the measure provides."

3. Prohibitive and restrictive provisions in a constitutional amendment are self-executing, unless it clearly appears from the language of the entire pro-

vision and the circumstances of its adoption that the enactment of legislation was contemplated as requisite to put it into effect. The scope and purpose of such provisions may not be restricted by adverse legislation, and all statutes then existing or which may thereafter be passed inconsistent with such provisions are null and void: *Long v. Portland*, 53 Or. 92 (98 Pac. 149, 1111); *State v. Harris*, 74 Or. 573 (144 Pac. 109, Ann. Cas. 1916A, 1156); *Wren v. Dixon*, 40 Nev. 170 (161 Pac. 722, 167 Pac. 324, Ann. Cas. 1918D, 1064); 12 C. J. 731; Cooley Const. Lim. (7 ed.), 121.

In 12 C. J., 739, Section 143, it is said:

“A constitutional provision that is not self-executing does not affect existing statutes until the enactment of legislation putting it into effect; but if a portion of such provision is repugnant to a statute in force when the Constitution was adopted, it abrogates such statute, notwithstanding the remainder of the constitutional provision is not self-executing, and is left without legislation in aid of it.”

See *Griebel v. State*, 111 Ind. 369, 12 N. E. 700), and *Hawley v. Anderson*, 99 Or. — (190 Pac. 1097, 1099), dissenting opinion of Chief Justice McBRIDE. The latter opinion thoroughly presents the question involved, and it is not the intention of the writer to add anything thereto.

In *Chew Heong v. United States*, 112 U. S. 536, at page 549 (5 Sup. Ct. Rep. 255, at page 260, 28 L. Ed. 770, see, also, Rose's U. S. Notes), Mr. Justice HARLAN, delivering the opinion of the court, quotes from *Wood v. United States*, 16 Pet. 362 (10 L. Ed. 987), as follows:

“Mr. Justice STORY, speaking for the court upon a question of the repeal of a statute by implication,

said: 'That it has not been expressly or by direct terms repealed is admitted; and the question resolves itself into the narrow inquiry whether it has been repealed by necessary implication. We say by necessary implication, for it is not sufficient to establish that subsequent laws cover some, or even all, of the cases provided for by it, for they may be merely affirmative, or cumulative, or auxiliary. But there must be a positive repugnancy between the provisions of the new laws and those of the old, and even then the old law is repealed by implication only *pro tanto*, to the extent of the repugnancy.' "

The same principle was recognized by this court in the case of *State v. Portland, R. L. & P. Co.*, 56 Or. 32 (107 Pac. 958). The Constitution as amended in 1919, in effect said to the counties:

"You may create debts for permanent roads in your county not exceeding 6 per cent of the assessed value of the property of the county, on approval of a majority of those voting thereon."

The constitutional amendments of 1912 and 1919 both contain two elements—one an express grant to counties to create debts for permanent roads, and the other a limitation on the amount of the debts created for such purposes. The grant is the right to create debts up to a certain limit for road purposes on approval of a majority of electors voting thereon. The right to create debts is granted, the limit upon the debts so created is fixed, and the conditions upon which the right may be exercised are named. Neither the right to create the debts, nor the amount of debts that may be created, nor the conditions upon which the debts may be created, are left to legislative control, but are granted, limited and named in the amendment to the Constitution itself.

Under our form of government the sovereign will resides in the people. That will is expressed in a written Constitution, which constitutes the fundamental law of the state. The people, in their sovereign capacity, assumed the function of limiting, by the amendments of 1912 and 1919 to Section 10, the amount of indebtedness that counties could incur for building and maintaining permanent county roads, and thereby withdraw that subject from legislative authority.

4. If Section 10 in its present form grants to counties authority to create indebtedness for the purpose of constructing and maintaining permanent roads, on approval by a majority vote, to the extent of 6 per cent of the assessed valuation of all the property in the county, as we think it does, then the provision of Section 19 of Chapter 103, General Laws of Oregon, 1913, directing that no bond shall be issued under the act which will make the bonded indebtedness exceed 2 per cent of the assessed valuation of the county at the time the bonds are issued, is inconsistent with the late amendment to Section 10, and is null and void. The other provisions of Chapter 103 are not repugnant to the constitutional amendment, and are therefore in full force and effect.

The language of Section 19 of Chapter 103, and of the whole act, clearly indicates that it was the purpose of the legislature to simply provide a *modus operandi* for counties in the issuance of bonds, and not to grant or restrict the authority for incurring indebtedness conferred by the Constitution. Section 19 merely called attention to the then existing limit prescribed by the Constitution. It does not refer to the incurring of debts or liabilities by counties. It only relates to the bonds, which are merely evidences

of such indebtedness. The legislature has been in session since the amendment of Section 10, Article XI, of the Constitution in 1919, and submitted another amendment to that section by adding a proviso authorizing Crook and Curry Counties to issue bonds for additional purposes, which amendment was adopted in 1920. The lawmakers evidently did not deem it necessary, in order to make the amendment operative, to enact any further legislation.

5. A constitutional amendment designed to cure a defect in the law or remove an existing mischief, should never be construed as dependent for its efficacy and operation on legislative will: 12 C. J., p. 730, § 106.

6. When Section 10 was amended in 1910, granting the power to counties to contract debts for permanent roads, without limitation, but only on approval of the majority of those voting upon the question, it was held in *Andrews v. Neil*, 61 Or. 471, at page 474 (120 Pac. 383, 123 Pac. 32), that the amendment clearly contemplated that the question of incurring an indebtedness for this purpose should be submitted to the voters of the county, that this rendered necessary an election, and that before an election could be held, the machinery for holding such election must be provided. Consequently in 1913 the legislature enacted Chapter 103, General Laws of Oregon 1913, which, as its title indicates, provides a complete manner of procedure for holding an election and the issuance of county bonds for the purpose of the construction and maintenance of permanent highways. Therefore when Section 10 was amended in 1919, Chapter 103, eliminating Section 19, provided a means for furnishing all the machinery for holding an election to authorize the

issuance of road bonds, and to put the amendment into operation.

While it may be conceded that the amendment to Section 10, Article XI, of the Constitution, in 1919, is not wholly self-executing, it is by reason of Chapter 103 rendered operative. There was no necessity for further legislation on this subject to render the amendment of 1919 effective. In *Ladd v. Holmes*, 40 Or. 167 (66 Pac. 714, 91 Am. St. Rep. 457), where the primary election law was before the court, an objection was made that the primary law had no effect, inasmuch as it made no provision for any special election. To this objection this court, speaking through Mr. Justice WOLVERTON, said, 40 Or., on page 190 (66 Pac. 722, 91 Am. St. Rep. 457):

“Objection is made that the law makes no provision for any special election that may become necessary, but this is not vital, as the effect would be to relegate the parties to the law heretofore governing primary elections.”

In considering the question of whether or not a constitutional amendment was self-executing, the court in *Winchester v. Howard*, 136 Cal. 432, at page 440 (69 Pac. 77, at page 79, 89 Am. St. Rep. 153, at page 158), says:

“The procedure need not be provided by the Constitution, if the Code of Civil Procedure and other remedial laws supply what is necessary.”

After a careful examination and reconsideration of the question involved, we hold that the amendment of Section 10, Article XI, of the Constitution, taken in connection with Chapter 103, General Laws of Oregon 1913, is in full and complete effect. The bonds in question were regularly issued and are valid obligations of the county of Union.

The demurrer to the answer to the writ is sustained, and a peremptory writ is awarded.

PEREMPTORY WRIT ALLOWED.

BENSON, J., dissents.

BURNETT, J., Dissenting.—The state Constitution has always been construed as a restriction, and not a grant, of power. Constantly since the organization of the state government the rule has been that the legislative assembly lawfully can enact any statute it chooses, unless forbidden by the Constitution of the state or of the United States. Section 10 of Article XI of the state Constitution reads thus:

“No county shall create any debts or liabilities which shall singly or in the aggregate, with previous debts or liabilities, exceed the sum of \$5,000, except to suppress insurrection or repel invasion or to build or maintain permanent roads within the county; and debts for permanent roads shall be incurred only on approval of a majority of those voting on the question, and shall not either singly or in the aggregate with previous debts and liabilities incurred for that purpose, exceed six per cent of the assessed valuation of all the property in the county.”

The language is restrictive throughout. It does not grant any power affirmatively. Its prohibitions are laid upon the counties only. It does not profess to prevent the legislative assembly from further limiting the indebtedness which counties may incur. It well may be conceded that the legislature could not authorize county indebtedness for roads in excess of the 6 per cent limit; but the power of that body is not limited in the other direction. The question ought not to be settled by consideration of this section alone. It is only a part of the Constitution, and that

instrument ought to be construed and enforced so that, if possible, all its parts shall harmonize. In the adoption of this section there was no intention to abridge the power of the legislature to enact laws to promote economy and lower taxation. The positive limit of 2 per cent established by law is not affected by the constitutional negative of 6 per cent. In construing the new section we must bear in mind the former and older Section 1 of Article IV, vesting the legislative power in the legislative assembly, subject, of course, to the people's reservation of the powers of initiative and referendum.

The amendment does not in any sense profess to divorce counties from the control of the legislature in limiting their expenditures or to repeal any of its previous enactments. To give the amendment the effect of an affirmative direction or license to counties to go in debt 6 per cent of their property valuation, is to cripple the legislative power unwarrantably.

I concur in the dissent of Mr. Justice BENSON.

Argued October 25, modified as affirmed December 14, 1920.

ARAMBURN v. GUERRICAGOITIA.

(193 Pac. 922.)

Partnership—Managing Partner may Bind Firm by Chattel Mortgage in Own Name.

1. Where a partnership had not adopted a firm name, the managing partner, who had authority to transact the business for the firm, could execute a chattel mortgage of the firm property to secure a firm debt in any name he chose to adopt, including his individual name, and such mortgage would bind the other partner.

Partnership—Chattel Mortgage in Name of One Partner Held Obligation of Firm.

2. A chattel mortgage of firm property, signed by only one member of the firm in his individual name, is an obligation of the

firm, where that partner had theretofore transacted the business of the firm, including the banking of its money, in his own name, and the mortgage was given to renew the lien of a previous mortgage of the same property, which was signed by both partners.

Evidence—Fact That Mortgage Pertained to Firm Matters may be Proved by Testimony.

3. In a suit to foreclose a chattel mortgage of firm property, signed by only one partner in his individual name, the fact that the mortgage and other writings signed by that partner in his own name pertained to partnership matters was properly established by testimony.

Partnership—Facts Held not to Show Conspiracy by Mortgagee and Partner to Defraud Other Partner.

4. In suits to foreclose a chattel mortgage of firm property and for an accounting between the partners, the fact that the partner who signed the mortgage for the firm defaulted in the foreclosure suit and retained the attorney for the mortgagee to represent him in the accounting suit does not justify the conclusion that the mortgagee and the partner were working together to defraud the other partner.

From Malheur: DALTON BIGGS, Judge.

In Banc.

This is a suit to foreclose a chattel mortgage upon a band of sheep and the increase and wool thereof, for the sum of \$23,049.65 and future advances. From a decree in favor of plaintiff, defendant Loren Goicochea appealed. The plaintiff also prosecuted a cross-appeal.

The controversy involved in this suit arose substantially as follows: About October, 1909, the defendants, Ignacio Guerricagoitia and Loren Goicochea, whom we will hereafter refer to by their first names, agreed to form a partnership and engage in the sheep business. On November 19th of that year the defendants purchased from Frank Aramburn 2,500 ewes and 45 bucks for the sum of \$14,290, executed their promissory note for that amount due in four years with interest at the rate of 10 per cent per annum, and as security therefor executed a chattel mortgage on the

sheep. Each of the defendants had an equal interest in the business. On November 21, 1910, Frank Aramburn and these defendants adjusted their business, and found the indebtedness then owing from defendants to Frank Aramburn amounted to \$15,794.40. In evidence thereof Ignacio and Loren executed and delivered their promissory note for the amount, payable November 21, 1913, with interest at 10 per cent per annum, the same being signed with the individual names of each. To secure the payment of the note and future advances, not to exceed \$5,000, for expenses in running the sheep, defendants executed in their individual names, acknowledged and delivered to Frank Aramburn a chattel mortgage upon the sheep, which was duly filed and recorded. A copy of the mortgage is attached to the complaint, as Exhibit "A." About November 21, 1913, when this obligation became due, Frank Aramburn and Ignacio had an accounting as to the firm's dealings with Frank Aramburn. It was agreed that the amount then owing upon the mortgage, Exhibit "A," was \$23,049.65, and a note and chattel mortgage were executed by Ignacio. A copy of this mortgage is attached to the complaint, as Exhibit "B." This mortgage was duly recorded and the prior mortgage, Exhibit "A," was satisfied upon the records.

Loren claims that, as this mortgage was signed by Ignacio alone, it created a lien upon Ignacio's interest in the personal property only, and that Loren is not responsible. It is claimed on behalf of plaintiff that when the prior mortgage, Exhibit "A," became due Frank Aramburn sought a settlement and called on Loren, who would have nothing to do with adjusting and settling the claim; that thereafter he went to

Ignacio and obtained the last-mentioned mortgage; and that the mortgage is that of the partnership.

No written partnership agreement was made between Loren and Ignacio, and no account-books were kept, but they transacted virtually all of the firm's business through the bank and in the name of Ignacio Guerricagoitia, until about June 16, 1913. Ignacio did the principal part of the business, drawing the checks and signing his name thereto, a portion of which were delivered to Loren, signed in blank for him to use.

Prior to November 21, 1910, the firm was doing business with the Capital State Bank, Boise, Idaho, in the name of Ignacio Guerricagoitia: Loren and Ignacio each participated therein, and closed up the account November 21, 1910. Afterwards the firm opened an account with the First National Bank of Boise, Idaho, the first deposit being \$1,500, which was an advancement by Frank Aramburn. This firm account was also in the name of Ignacio Guerricagoitia and was used for the firm's business until December 2, 1913. Loren, Ignacio, and Frank Aramburn had notice thereof. In December, 1913, the banking business of the enterprise was transferred to the Quinn River Bank, McDermitt, Nevada. The banking was done under the same name as before.

Both of the partners engaged in the management of the sheep, tending camp and herding, until about June 16, 1913, when Loren became dissatisfied with the management of the business by Ignacio and the financial status, the firm being then in debt in excess of the value of the personal property. He ceased active participation in the partnership business, and engaged in herding sheep for other parties, after

property of the defendant Ignacio, and that it was error to decree that any part of the indebtedness of the partnership to plaintiff, amounting to \$29,506.19, should be paid by the receiver out of the share claimed by Loren. It is the position of plaintiff upon the cross-appeal that the mortgage of November 21, 1913, created a lien upon all of the partnership property, and that the plaintiff is entitled to the payment of the indebtedness due the estate, with interest and attorneys' fees in this suit.

1. It does not appear that any partnership name was agreed upon between the partners in which to conduct the business, except as the business was transacted in the name of Ignacio Guerricagoitia. Where no name has been fixed by agreement of partners, the partner charged with the duty, or clothed with the authority, to sign contracts for the firm may bind all the members by such signature as he may choose to employ: 30 Cyc. 421. It is unquestioned that one partner may execute a valid mortgage of partnership goods to secure a partnership debt by signing the firm name or the individual names of the members of the firm. One copartner, having authority to pass a valid title to personal property of the partnership by bill of sale, may, as incident thereto, execute a transfer of it in any form or mode by which such title could in any case be legally transferred. It is immaterial whether he sign the name of each copartner separately, or sign the firm name: Jones on Chattel Mortgages (5 ed.), § 46. In 1 Lindley on Partnerships (2 Am. ed.), page 426, we read thus:

"Firm liable though not named—Written contracts. If, therefore, one partner only enters into a written contract, the question whether the contract is confined to him, or whether it extends to him and his copart-

ners, cannot be determined simply by the terms of the contract. For supposing a contract to be entered into by one partner in his own name only, still if in fact he was acting as the agent of the firm, his copartners will be in the position of undisclosed principals; and they may therefore be liable to be sued on the contract, although no allusion is made to them in it.
* * ,,

In a note to this Section at page 428, we read:

“Thus where one partner enters into a simple contract, though in writing, in his individual name, but in fact for his firm, although that fact is not known to the other contracting party, an action may be maintained on it in the name of the firm, by alleging that it was entered into by the firm by the name and style of the name of the one partner, each partner being the agent of the firm: *Havana etc. R. R. Co. v. Walsh*, 85 Ill. 58.”

We find it laid down in 1 Rowley, Modern Law of Partnership, Section 265, as follows:

“*Use of firm name.*—In opposition to the doctrine that the name formally adopted as that of the firm must be used in order that the partnership may be bound, the proposition that such symbolical name may be displaced by an effective substitute when the intention of the parties is to bind the firm and the partnership appropriates the consideration, has found favor with a number of courts. ‘Partners may bind themselves by other than such prescribed firm name, if they choose to adopt for convenience, or to prevent confusion, a different mode of executing their obligations or contracts from the one prescribed by their original agreement.’ And one partner may, if no firm name has been agreed on, bind the firm within the scope of his authority by any name he may select.”

A managing partner may bind the firm by borrowing money, executing notes, and renewing notes, at

least where he has been held out as having such authority: 1 Rowley, Modern Law of Partnership, § 417. If the name of an individual partner is used as a firm name, the firm is bound thereby: *Palmer v. Stephens*, 1 Denio (N. Y.), 471; *Bank of Rochester v. Monteath*, 1 Denio (N. Y.), 402 (43 Am. Dec. 681); *Crable v. O'Connor*, 21 Wyo. 460 (133 Pac. 376).

2. Undoubtedly the indebtedness secured by the chattel mortgage, Exhibit "B," was that of the firm. Loren should have known it. There was no new consideration passed. It was but a renewal of the old mortgage which Loren had signed himself, with the increase of the indebtedness added. Ignacio was apparently not only authorized to transact the business of the partnership, but for a long time had been transacting such business in his name. The chattel mortgage covered partnership property only. There is no intervening right of a third party affected. As between Frank Aramburn, mortgagor, and Ignacio and Loren, the members of the partnership, the mortgage in question created a lien upon the partnership property described therein for the security of the partnership indebtedness, and should be foreclosed: *Hembree v. Blackburn*, 16 Or. 153 (19 Pac. 73); *Salt Lake Brewing Co. v. Hawke & Andrews*, 24 Utah, 199, 207 (66 Pac. 1058); *Reynolds v. Cleveland*, 4 Cow. (N. Y.) 282 (15 Am. Dec. 369); *Schemerhorn v. Laine*, 7 Johns. (N. Y.) 311; *Smith v. Collins*, 115 Mass. 388; *Pahlman v. Taylor*, 75 Ill. 629.

By a long course of dealing the partnership impliedly adopted the name of Ignacio Guerricagoitia as the partnership name, although there was no express agreement to that effect. The execution of the note and mortgage of November 21, 1913, was necessary to carry on the business of the partnership in the ordi-

nary manner. The transaction was common in the business in which the firm was engaged, and was well within the scope of such business. The execution of the note and chattel mortgage by Ignacio in the interest of, and for the firm, was sufficient to bind both members of the firm. The firm received the benefit of the instruments so executed. They were the very means by which the life of the business was continued: 30 Cyc. 485, 487.

3, 4. The fact that the writings signed by Ignacio pertained to partnership matters was properly established by the testimony: 20 R. C. L., p. 898, § 109. In order for Ignacio to secure the payment of the partnership debts, it was not absolutely essential to have the concurrence of Loren: 20 R. C. L., p. 912, § 124. It is claimed by Loren that Ignacio, Frank Aramburn before his death, and plaintiff after he assumed control, were working together to defraud Loren. The facts as disclosed by the record do not bear out such claim. It is urged on behalf of Loren that the letter written by Frank Aramburn from Spain, February 12, 1916, after he heard that Loren was to commence a lawsuit, tends to show that he was afraid of the result of litigation. The letter states, in effect, that he had always treated both Loren and Ignacio well; that it was not necessary to have a lawsuit, and requested that none be commenced until he returned. The indebtedness of the firm to Aramburn was then great, and litigation would undoubtedly embarrass Frank Aramburn and delay a collection, as subsequent events have proven. Ignacio made no appearance in the foreclosure suit. He employed the attorney in the suit for an accounting and dissolution of the partnership, who represented Aramburn in the foreclosure suit. This fact is dwelt upon as supporting

the contention made by Loren, but we fail to see that it justifies such a conclusion; there being no clash of interests between Aramburn and Ignacio. The record discloses that Amos Aramburn had been lenient in his dealings with both of the defendants. It is only by reason of the high prices prevailing for sheep and wool at the time they were fortunately sold by the receiver that the mortgagee is able to obtain his money. The failure of the firm to pay the indebtedness necessitated the bringing of this suit, and plaintiff is entitled to recover \$1,500, the amount fixed by the trial court but not decreed, as reasonable attorneys' fees. This is in accordance with the tenor of the note and mortgage.

A supplemental complaint was filed, showing that since the filing of the original complaint, and on October 15, 1916, Ignacio being unable to care for the sheep longer, delivered the possession of the mortgaged property to plaintiff. Since that time plaintiff has furnished feed and pasture, herders, camp-tenders, and camp supplies in caring for the mortgaged property. He sheared and marketed the wool obtained from the sheep in 1917, and expended large sums of money to preserve the property.

Loren, by his answer to the supplemental complaint, claims that the 16,578 pounds of wool sold by plaintiff on June 15, 1917, for 43 cents per pound, amounting to \$7,128.54, was on and prior to November 5th and since that time of the value of 60 cents per pound, or the total market value of \$9,946.80; that one half of such wool was his property, and was sold without authority; and that he is entitled to one half of the difference between the two mentioned sums, amounting to \$1,409.13, which plaintiff should be required to pay him. Loren also claims by this

answer that there are now in the possession of this plaintiff 350 head of ewes of the value of \$16 per head, and 75 lambs of the value of \$9 per head, which plaintiff failed to deliver to the receiver, one half of which is the property of Loren; and that plaintiff should be required to deliver one half of the sheep to Loren or pay to him the value thereof, \$3,175.50. He asks judgment against plaintiff in the sum of \$4,584.63. Plaintiff replied to the effect that all the property and money held by him, as mortgagee, was turned over to the receiver.

We have carefully read all of the testimony in the case. It was given by the defendants in the Basque language, through an interpreter, and is conflicting. A statement of the testimony would be difficult and of no value. When Amos Aramburn took possession of the mortgaged property with the consent of Ignacio, no care was taken to count the sheep until shearing time the next season, when 2,377 were counted. He had no other sheep with which they could become mixed, and we think the testimony shows that all of the mortgaged property was delivered to the receiver. The sheep were then carefully counted. If any sheep had been sold, disposed of, or retained by the administrator, it would seem such fact could have been easily ascertained and shown. As to the sale of the wool clip in 1917, the mortgagee acted much the same as it had theretofore been the custom. Defendant Loren has no real complaint to make on account of the difference in market price of wool on the different dates.

It is contended by Loren that there were wethers sold from the band of sheep by Ignacio prior to 1915, when there was such sale made and accounted for. We do not think the claim is sustained, taking into

consideration all of the circumstances and testimony in connection with the matter; the fact that Loren had himself herded the sheep for considerable of the time prior to June, 1913, and was in a position to know of any sale up to that time; that the means of the partnership were limited and they were much of the time running on "low gear," so to speak, and kept the sheep "on the desert" sometimes in winter without feed prepared; and that a number of sheep were lost and others died. We have carefully examined the testimony as to the other items mentioned in the decree. It does not warrant any change in the findings of the lower court.

The decree of the lower court, modified as above indicated, will be affirmed, with directions for the trial court to make such supplemental orders and decrees as may be deemed necessary in winding up the partnership affairs and settling the mortgage, not inconsistent herewith. The costs and disbursements in both of these suits should be paid from the partnership assets.

AFFIRMED AS MODIFIED.

Argued at Pendleton October 25, affirmed as modified December 7, 1920.

GOICOCHEA v. GUERRICAGOITIA.

(193 Pac. 925.)

From Malheur: DALTON BIGGS, Judge.

In Banc.

This is a suit for an accounting of the partnership affairs and the dissolution of the partnership between plaintiff and defendant. The history of the contro-

versy is stated in an opinion this day rendered, in the case of *Aramburn v. Guerricagoitia*, ante, p. 258 (193 Pac. 922), to which opinion reference is hereby made. The trial court rendered a decree covering the matters involved in both cases. Both plaintiff and defendant have appealed from the decree in this suit.

AFFIRMED AS MODIFIED.

For appellant there was a brief over the names of *Mr. Julien A. Hurley* and *Mr. Gus A. Hurley*, with an oral argument by *Mr. Julien A. Hurley*.

For respondent there was a brief and an oral argument by *Mr. C. M. Crandall*.

BEAN, J.—The opinion in the foreclosure suit of *Aramburn v. Guerricagoitia* above referred to, having disposed of all questions discussed in the briefs in this case, nothing further is deemed necessary. The decree in that case will determine the issues in this suit.

AFFIRMED AS MODIFIED.

Motion to dismiss appeal and affirm judgment allowed December 14, 1920.

RAHN v. GRAY.

(193 Pac. 926.)

Appeal and Error—Appeal Dismissed, and Judgment Affirmed, for Failure to File Abstract.

1. Where appellant asks and obtains 20 days' additional time within which to file her abstract, and fails to file it within several months, a motion for dismissal and affirmance of judgment will be granted, under Rules 6 and 16, 89 Or. 712, 718, (173 Pac. viii, x).

**Appeal and Error—Unreasonable Delay in Filing Bill of Exceptions
No Excuse for Failure to File Abstract.**

2. While the Supreme Court has not fixed any precise limit of time within which a bill of exceptions must be settled and filed and sent to it, it will not allow an unreasonable delay in so doing to excuse a failure to file the abstract within the time allowed by the rules or an extension of such time.

From Klamath: DELMON V. KUYKENDALL, Judge.

In Banc.

This is a motion by the respondent for a dismissal of an appeal and affirmance of the judgment of the Circuit Court.

APPEAL DISMISSED. JUDGMENT AFFIRMED.

Mr. H. M. Manning and Mr. William Ganong, for the motion.

Messrs. Rutenic & Yaden, contra.

McBRIDE, C. J.—1. Various grounds for dismissal are set forth, but we find it sufficient to consider only one, the failure of the appellant to file an abstract as required by Rule 6, 89 Or. 712 (173 Pac. 8), which specifies that such abstract shall be filed within twenty days, after the transcript is filed in this court. Rule 16, 89 Or. 718 (173 Pac. 10), provides:

“If, without reasonable excuse, the appellant fails or neglects to serve and file abstracts or briefs as required by the rules of this court, the respondent may have the judgment or decree affirmed on motion and notice; and in case of an abandoned appeal, the opposite party may have the judgment or decree likewise affirmed on motion by presenting a copy of the judgment or decree, undertaking, notice of appeal, and proof of service thereof.”

On March 31, 1920, a judgment was rendered against plaintiff for \$954.16 and costs. Her appeal was finally perfected on June 11, 1920, and the transcript was filed here July 12, 1920, within the time re-

quired by law. The transcript contained only certified copies of the judgment, notice of appeal with proof of service, and the undertaking, barely sufficient to give this court jurisdiction. On August 2d appellant asked and obtained twenty days' additional time within which to file her abstract. It was not filed within that time, and has never been filed. Neither has there ever been any further extension of time. No bill of exceptions has ever been presented to the court below for allowance and settlement, so that so far as this court is concerned the case still stands here with nothing supporting the appeal except the bare jurisdictional transcript.

The appellant's attorneys attempted to excuse the failure to file the abstract by an affidavit which does not deny the failure to file the abstract, and admits that no bill of exceptions has been tendered for settlement, but alleges that appellant's attorneys are diligently at work preparing one which will be served and filed within a week; also that the appeal is being prosecuted in good faith and with the full belief that reversible error occurred at the trial. The excuse given for the failure to file a bill of exceptions is that for some time after the trial the court stenographer was so engaged in court work that he was unable to extend the testimony, and later that delay in arrangements for an appeal and perfecting same was necessarily caused by the absence of appellant in California. Neither of these contentions is supported by the record. The certificate of the clerk shows that the testimony was extended and filed with the clerk of the Circuit Court on June 19, 1920, five months before the affidavit was filed. And the personal presence of appellant was certainly not necessary to

enable counsel to prepare and settle the bill of exceptions or to prepare and file the abstract.

2. While this court has not fixed any precise limit of time within which a bill of exceptions must be settled and filed and sent to this court, it will not allow an unreasonable delay in so doing to excuse the failure to file the abstract within the time allowed by our rules, or an extension of such time. Cases are not set for hearing in this court until the abstract and briefs are filed, and to permit unreasonable delay in the filing of abstracts hinders the setting down and hearing of cases just to the extent that the abstract is withheld. Our leniency in excusing defaults and these matters has been great, perhaps too great, but this delay is too unreasonable, and the excuse for it too weak to justify us in overlooking it.

The appeal will be dismissed and the judgment affirmed. **APPEAL DISMISSED. JUDGMENT AFFIRMED.**

Submitted on motion to dismiss appeal October 5, appeal dismissed and judgment affirmed October 12, modified on petition for rehearing December 14, 1920.

LOGAN v. CROSS.

(192 Pac. 656, 1119.)

Appeal and Error—Surety must Appear Before Judge or Clerk to Justify.

1. Under subdivisions 2, 3, Section 550, L. O. L., relating to sureties on the appeal undertaking, and requiring them to justify as a case of bail on arrest, and Section 270, requiring bail to attend before the judge or clerk to justify, an undertaking on appeal is insufficient where the surety, instead of appearing before the judge or clerk, appeared before a notary public, and was examined on written interrogatories.

PETITION FOR REHEARING.

Appeal and Error—Cognizance not Taken of Oral Stipulations Out of Court.

2. Appellate court cannot take cognizance of oral stipulations made by attorneys outside of court.

Appeal and Error—Appellant Permitted to File Additional Undertaking After Dismissal, on Showing of Illness of Counsel.

3. After dismissal of an appeal by reason of failure of surety on appeal undertaking to properly justify before a judge or clerk, appellant was permitted to file an additional undertaking, where it appeared that his attorney was ill and spent some days in the hospital, rendering it impossible for him to attend to his client's affairs.

From Crook: T. E. J. DUFFY, Judge.

In Banc.

Action by A. M. Logan and another, copartners doing business under the firm name and style of Logan Bros., against R. B. Cross. Judgment for the plaintiffs, defendant appeals, and plaintiffs move to dismiss the appeal. Appeal dismissed, and judgment affirmed.

APPEAL DISMISSED.

Mr. Jay H. Upton and *Mr. Willard H. Wirtz*, for the motion.

Mr. N. G. Wallace, contra.

PER CURIAM.—1. This is a motion to dismiss an appeal for want of a sufficient undertaking. The plaintiffs on March 18, 1920, recovered a judgment against defendant for the sum of \$535.00, and \$93.30, costs. On May 8, 1920, defendant filed and served his notice of appeal with an undertaking sufficient in form and amount, signed by C. E. Cross as surety, the affidavit of the surety being dated March 29, 1920. Thereafter and in due time the plaintiffs filed their exception to the sufficiency of the surety, whereupon, without appearing before the court or clerk thereof, he was examined before a notary upon written interrogatories propounded by the counsel for defendant, plaintiffs not appearing at said hearing, from which interrogatories and answers thereto it appeared that

the surety was worth the sum of \$11,000, over and above his debts and property exempt from execution.

Plaintiffs now move to dismiss the appeal for the reason that such justification was not taken before the court or the clerk thereof. Subdivision 2 of Section 550, Oregon Laws, provides:

“Within ten days from the giving of notice or service of notice of the appeal, the appellant shall cause to be served on the adverse party or his attorney an undertaking as hereinafter provided, and within said ten days shall file the original of said undertaking, with proof of service indorsed thereon, with said clerk. Within five days after the service of said undertaking, the adverse party or his attorney shall except to the sufficiency of the sureties in the undertaking, or he shall be deemed to have waived his right thereto.”

Subdivision 3 of said section provides:

“The qualifications of sureties in the undertaking on appeal shall be the same as in bail on arrest, and, if excepted to, they shall justify in like manner.”

Section 270, Oregon Laws, provides:

“For the purpose of justification, each of the bail shall attend before the judge or clerk, at the time and place mentioned in the notice, and may be examined on oath, on the part of the plaintiff, touching his sufficiency, in such manner as the judge or clerk in his discretion may think proper. The examination shall be reduced to writing and subscribed by the bail, if required by the plaintiff.”

It nowhere appears that the surety appeared before the judge or clerk for the purposes of justification. On the contrary, it appears that he did not so appear, and that his examination was upon written interrogatories. The personal presence of the surety before one of the officers designated is clearly re-

quired. Appeal is a privilege which can only ripen into a right by substantial compliance with the requirements of the statute.

The appeal will be dismissed, and the judgment affirmed.

APPEAL DISMISSED. AFFIRMED.

Modified December 14, 1920.

PETITION FOR REHEARING.

(192 Pac. 1119.)

On petition for rehearing.

FORMER OPINION MODIFIED.

Mr. N. G. Wallace; Mr. M. E. Brink and Mr. Donald M. Graham, for the petition.

Mr. Willard H. Wirtz and Mr. Jay H. Upton, contra.

McBRIDE, C. J.—A petition for rehearing has been filed in this case, accompanied by an affidavit claiming that there was an oral stipulation between the respective attorneys that the justification of the surety might be taken by interrogatories. The affidavit states that this agreement is now denied by the attorney for plaintiff.

2, 3. While we cannot take cognizance of oral stipulations made by attorneys outside of court, we are satisfied that there is a misunderstanding between them in this case as to the import of the conversation between them in relation to taking the justification of the surety. As excuse for not having made any showing before our opinion was handed down dismissing the appeal, the affidavit discloses the fact that the

attorney for defendant was ill at the time the motion to dismiss was filed and was unable to attend to the business of his office, but as soon thereafter as possible he went with defendant to Portland for the purpose of executing a surety company undertaking. While there he again became ill, and was forced to spend some days in the hospital, and upon his return home was informed that the matter had been decided adversely to his client. He has now prepared and filed with the clerk of the Circuit Court an additional undertaking, and exhibits a copy of it with his affidavit, asking leave to file the same.

We think that the circumstances shown are such that he should be permitted to do this, and our original opinion is modified, so as to permit counsel to serve upon plaintiff's counsel a copy of the undertaking proffered by him, or other sufficient undertaking, which, if approved by the court upon objection, or if no objections are made within the statutory time, may be sent up to this court and filed; this to be done within thirty days from the time this opinion is handed down.

FORMER OPINION MODIFIED.

Argued October 20, reversed and decree entered December 14, 1920.

JOHNSTON v. APPLE.

(193 Pac. 1024.)

Appeal and Error—Finding of Lower Court Entitled to Weight, Though Case is Tried De Novo.

1. A proceeding on a verified claim against the estate of a deceased, being an equitable one, is under the statute tried *de novo* in the Supreme Court, as well as the Circuit Court on the record made in the County Court, but the fact finding of the county judge is entitled to some weight, as he heard the witnesses.

On presumption of ownership of note arising from possession, see note in 17 L. E. A. 326.

Bills and Notes—Presumption of Ownership from Possession.

2. The possession of a note by the holder and original payee after the death of the maker raises the statutory presumption of ownership declared by Section 799, subdivision 11, Or. L.

Executors and Administrators—Evidence of Payment Insufficient to Rebut a Presumption of Ownership from Possession.

3. In a proceeding against the estate of a deceased, based on a note in the possession of claimant at the time of the death of the maker, and of which he was the original payee, evidence of payment held wholly insufficient to rebut the statutory presumption of ownership, so that the denial of the claim was improper.

From Multnomah: CALVIN U. GANTENBEIN, Judge.

Department 1.

The appellant, N. M. Apple, was a real estate broker in the City of Portland. Chas. M. and Eunice E. Hollopeter were the owners of certain lands in Yamhill County, this state, which they exchanged for other lands in Tillamook County through the agency of Apple, whom they employed to represent them. In consideration of his services, and on February 11, 1913, they executed to him their certain joint and several promissory note for \$500, payable two years after date, with interest thereon at the rate of 8 per cent per annum, payable semi-annually. On December 15, 1913, a payment of \$20 was made, for interest to August 11, 1913. On March 14, 1914, another \$20 payment was made, for interest to February 11, 1914, and on August 8, 1914, another \$20 payment was made, for interest to August 11, 1914. Such payments are indorsed on the back of the note, and there is no evidence on its face that any other payments were ever made on the note. It appears that at the time of the exchange there was a mortgage on the Tillamook lands for \$3,736, executed October 15, 1910, and that to secure the payment of his note Apple took a second mortgage upon those lands; that a suit

was brought in the Circuit Court of Tillamook County to foreclose the first mortgage, to which he was made a party; that a decree was rendered, foreclosing the mortgage and directing a sale of the property, and that the proceeds of such sale be applied to the amount of the first mortgage. Execution was issued. The property was sold under the decree, and was bid in for its amount; therefore nothing was realized by Apple upon his second mortgage to secure his note. About December 11, 1913, Apple assigned and delivered his note to the Northwestern National Bank of Portland, where it remained until January 6, 1916, during which time the above interest payments were made to the bank and credited upon the note. At its maturity, on February 11, 1915, it was formally presented to each of the Hollopeters for payment by a notary public in the employ of that bank. Chas. M. Hollopeter was a physician, and died December 30, 1915. He left no property, and there never was any administration of his estate. The principal assets of his widow consisted of a life insurance policy in her favor, in the sum of \$2,000. Eunice E. Hollopeter, widow of Dr. Hollopeter, died August 3, 1916. No relative having applied for letters upon her estate within the statutory time, Apple, claiming to be a creditor of the estate, filed a petition in the County Court of Multnomah County to be appointed as administrator of her estate, and by an order of the court was appointed and duly qualified, and ever since has been such administrator. On February 28, 1917, Apple filed in the County Court his verified claim against her estate for the amount of his promissory note and accrued interest, together with certain other claims which are not material to this opinion. A copy of the note and of a collateral agreement was

set out in the petition and made a part of it. In response to service of notice, Grace Johnston, one of the daughters of the deceased, who appeared on behalf of all the heirs and objected to the allowance of the claim, or any part thereof, for answer said:

"Petitioner admits that a promissory note of tenor and form described in paragraph I of said claim was executed by the said Eunice E. Hollopeter with Charles M. Hollopeter, but as to whether or not interest was paid to August 11, 1914, or until any other day or date, or as to how much or what interest was paid, your petitioner has no knowledge, or information or belief, but alleges on information and belief that the said note has been fully paid and discharged, and the said Eunice E. Hollopeter and her said estate relieved and released of all and every liability for or on account of said note or interest thereon, or any part thereof."

Testimony was taken under the issue, and a hearing was had before the county judge, who rendered a decree that the full amount of Apple's claim, based upon the note for \$500, with accrued interest, should be allowed and paid. From this decision, the heirs appealed to the Circuit Court, and after trial there that court rendered a decree that Apple's claim, based upon his note, should be disallowed, from which he appeals to this court.

REVERSED. DECREE RENDERED.

For appellant there was a brief over the names of *Mr. P. J. Bannon* and *Mr. J. N. Haddock*, with an oral argument by *Mr. Bannon*.

For respondents there was a brief over the name of *Messrs. Cake & Cake*, with an oral argument by *Mr. W. M. Cake*.

JOHNS, J.—1-3. This is an equitable proceeding, which, under the statute, is tried *de novo* here, and in the Circuit Court upon the record made in the County Court. The execution of the note being admitted, the only question presented is one of payment, and the burden of proof is upon the heirs of the deceased. The testimony is conclusive that soon after its execution the note was assigned by Apple as collateral to the Northwestern National Bank, where it remained until the 6th of January, 1916, during which time the three interest payments were made by C. M. Hollopeter. On that date the bank delivered the note to Apple, who has had actual possession of it ever since. Attorney Bannon testified that Apple exhibited the note to him at the time he prepared his petition to be appointed administrator of the estate of Eunice E. Hollopeter, which was soon after her death in August, 1916. That would entitle him to the statutory presumption under Section 799, Or. L., "that things in the possession of a person are owned by him," that is to say, the law presumes that Apple was then the owner and holder of the note. After hearing the testimony in open court, the county judge found that the claim should be allowed. He saw and heard the witnesses testify, and in this kind of a case his finding is entitled to some weight. The Circuit Court found, as a fact, that "after the death of C. M. Hollopeter, said note was not paid by Eunice E. Hollopeter, deceased," and there is no evidence that she ever paid the note, or ever claimed to have paid it. If the note was ever paid, it was paid by C. M. Hollopeter. The testimony is conclusive that soon after the execution of the note it was assigned, as collateral, to the bank, where it remained until

January 6, 1916. It appears that Dr. Hollopeter died December 30, 1915. Claudia A., the daughter-in-law of Dr. and Eunice E. Hollopeter, testified:

"Q. Do you not know that for mere than a year prior to his death, Dr. Hollopeter received no money from any source; that he was not able to pay his taxes or his interest, and that he was absolutely without funds of any kind?

"A. Yes. He was sick, and his sons took care of him. He had lost all through his trades."

The daughter, Mrs. Cadle, testified that he had softening of the brain and was in bed eight months prior to his death; that for the previous three or four months he was suffering from a stroke of paralysis.

"Q. What was the condition of your father's health for the year or two years prior to his death?

"A. Well, I would say for three years before papa's death he was not himself at all. He died from softening of the brain, and had been taken away from his work about three years before, I would say. He was not capable of attending to his business at all.

"Q. He was not doing any business during the entire year of 1915?

"A. No, sir.

"Q. Did he make any payments on this note during the year of 1915?

"A. No, I know nothing about it.

"Q. If any payments were made on the note it must have been made before that?

"A. Yes; he couldn't have made any during that time."

It is true that there is testimony of the daughter and the nurse, tending to show that the mother had said the note was paid; but there is no evidence that she ever claimed to have paid it, or as to when, how, or by whom it was paid. After the doctor's sickness the Hollopeters were in straightened circumstances,

and never had the money to pay the note, and the only assets of either of them were the \$2,000, life insurance, which was collected by the widow after his death. The bank records show that both of them were notified at the maturity of the note on February 11, 1915, and that it was then protested for nonpayment. There is no evidence of any claim that the note was then paid, or of any protest or objection by either of the Hollopeters, to the receipt of that notice. Dr. Hollopeter knew that the note was in the bank. It was there he made his interest payments, and the testimony is conclusive that the note remained in the bank until some time after his death.

When analyzed, the evidence of the payment of the note is founded upon inference and suspicions, largely growing out of the actions and conduct of Apple and the manner in which he testified, all of which, standing alone, might be construed as sufficient evidence of payment. But the stubborn fact remains that soon after its execution the note was deposited in the bank as collateral, where it remained until the 6th of January, 1916; that C. M. Hollopeter died in December, 1915; that he made the three interest payments to the bank, which are credited upon the note; that its records show, and its officers testify, that he never made any other payment to the bank, and that at its maturity, on February 11, 1915, the note was duly protested for nonpayment. If either of the Hollopeters had paid the note to the bank prior to January 6, 1916, they would then have been entitled to its possession, and in the ordinary course of business the bank would have delivered it to them. The Hollopeters knew that the bank held the note as collateral. During that period, any payment should have been made to the bank. Having such knowledge, the tes-

timony as to the payment direct to Apple should be clear and convincing. There is no evidence that anyone ever claimed to have paid the note to him, or as to when it was paid, or how it was paid. The decree of the Circuit Court will be reversed, and one entered here against the estate of Eunice E. Hollopeter in favor of Apple, for the full amount of his note, with accrued interest, without costs to either party in this court, or the County or the Circuit Court.

REVERSED. DECREE RENDERED.

McBRIDE, C. J., and HARRIS and BURNETT, JJ., concur.

Submitted on briefs at Pendleton October 25, reversed with directions to discharge defendant December 14, 1920.

STATE v. STEVENSON.

(193 Pac. 1030.)

Criminal Law—Compliance With Statute must be Shown Before Preliminary Statement to Committing Magistrate may be Admitted.

1. Before the statutory statement made by a defendant at his preliminary examination before a committing magistrate can be admitted in evidence against him at his trial on a criminal prosecution, it must affirmatively appear that notice of right to waive statement required by Section 1781, Or. L., was given.

Criminal Law—Confession Made to District Attorney Admissible as Extrajudicial Confession and not Under Statute.

2. Where defendant's alleged confession offered and received in evidence was made to the district attorney at his office in presence of the sheriff and deputy, and was no part of defendant's preliminary examination, it is admissible, if at all, as an extrajudicial confession, and not under Section 1781, Or. L.

Criminal Law—"Confession" Defined—"Judicial Confession"—"Extrajudicial Confession."

3. A "confession" is the voluntary admission or declaration made by a person who has committed a crime or misdemeanor to another

2. When confession is admissible though made to an officer, see note in 57 Am. Rep. 839.

Authorities discussing the question of admissibility of confessions to persons in authority are collated in notes in 18 L. R. A. (N. S.) 843, and 50 L. R. A. (N. S.) 1088.

of the agency or participation which he had in it; "judicial confessions" being those made before a magistrate or court in due course of legal proceedings, and "extrajudicial confessions" being those made elsewhere.

Criminal Law—Confession Inadmissible Where Obtained by Inducement of Person in Authority.

4. The common-law rules governing the admissibility of confessions are still in force in Oregon, so that a confession is inadmissible where obtained by temporal inducement, by threats, fear, promises or hope of favor held out to the party in respect to his escape from the charge against him by a person in authority.

Criminal Law—Determination as to Competency of Confession not Disturbed Unless Clearly Erroneous.

5. The competency of a confession as evidence is in the first instance addressed to the court, and its determination will not be disturbed on appeal, unless the record discloses clear and manifest error.

Criminal Law—Confession While in Custody not Inadmissible.

6. The fact that defendant's confession was made when he was in the custody of officers does not render the confession any the less admissible, it not having been induced by such custody.

Criminal Law—Extrajudicial Confession of Defendant Written Out by District Attorney and Signed Admissible.

7. Confession of defendant charged with adultery, written out by the district attorney and given to defendant to read, he signing it in the presence of two witnesses, *held* admissible as an extrajudicial confession, fully meeting the requirements as to competency.

Statutes—Legislative Intent Controls Construction.

8. The legislative intent always controls construction.

Courts—Constructions of Statute by Circuit Courts Do not Bind Supreme Court.

9. The constructions placed on the adultery statute by the Circuit Courts of the state do not bind the Supreme Court, but the rulings are persuasive, and, where the construction has been almost uniform for more than 50 years, it should not be set aside without grave reasons.

Adultery—Offended Wife or Husband has Exclusive Privilege to Institute Prosecution.

10. Under Section 2072, Or. L., when the crime of adultery has been committed between a married man and a married woman, the right to complain and institute prosecution on a charge of adultery against either of the guilty parties is the exclusive privilege of the unoffending wife or husband of the defendant proceeded against.

4. Admissibility of confession induced by person in authority, see note in, 6 Am. Rep. 246.

10. On the question of construction and effect of provisions requiring prosecution to be upon complaint of husband or wife, in action for adultery, see note in 19 L. R. A. (N. S.) 786.

Right of injured spouse to discontinue prosecution for adultery, see note in 4 A. L. R. 1340.

From Malheur: DALTON BIGGS, Judge.

In Banc.

William Stevenson, a married man, the defendant and appellant, was indicted by the grand jury of the Circuit Court of the State of Oregon in and for the county of Malheur, charged with the commission of the crime of adultery with one Ruth Lackey, wife of Herbert Lackey, the complaining witness. Upon trial had, the defendant was convicted and sentenced to serve a term of not more than six months in the penitentiary, from which judgment he appeals to this court.

The principal convicting evidence given at the trial was an alleged confession and the testimony of his accomplice. The defendant objected to the introduction of the confession as evidence, and saved an exception to the ruling of the court thereon. At the beginning of the trial, it was stipulated that the prosecution was commenced upon the complaint of Herbert Lackey, spouse of Ruth Lackey. Defendant objected to the introduction of any evidence in the case, for the reason that the prosecution was not based upon the complaint of the wife of the defendant. This question was likewise reserved by asking the court for an order directing the jury to return a verdict of not guilty because "the state has failed to prove that the prosecution was brought upon the complaint of the wife of the defendant," and was saved a third time by excepting to an instruction of the court to the effect that—

"It is sufficient, if you find that Ruth Lackey is the wife of Herbert Lackey, that the prosecution was instigated or instituted by Herbert Lackey, her husband."

REVERSED AND REMANDED WITH DIRECTIONS.

For appellant there was a brief submitted over the names of *Mr. Wm. E. Lees*, *Mr. W. H. Brooke* and *Mr. P. J. Gallagher*.

For respondent there was a brief prepared and submitted by *Mr. Ralph W. Swagler*, District Attorney.

BROWN, J.—Although witness Harry Farmer gave some testimony tending to prove opportunity to commit the offense, a conviction was had in this cause upon the testimony of the defendant's accomplice, corroborated by a confession made in the district attorney's office. The defendant challenged the admissibility of the confession, especially upon the ground and for the reason that the said confession or statement was not taken in accordance with the provisions of Section 1781, Or. L., providing as follows:

"When the examination of the witnesses on the part of the state is closed, the magistrate must inform the defendant that it is his right to make a statement in relation to the charge against him; that the statement is designed to enable him, if he sees fit, to answer the charge and explain the facts alleged against him; that he is at liberty to waive making a statement, and that his waiver cannot be used against him on the trial."

The objection, as we take it from the record, was as follows:

"Mr. Gallagher.—Now, I desire to object to the introduction of this testimony because there has been no proper foundation made for the introduction of it, because it appears from the testimony so far that this statement was made either immediately after * * or perhaps before the preliminary hearing had been dispensed with and pending his procuring bail, while he (defendant) was still in custody of the officers of the law, and it has not been shown that the prelimin-

ary hearing was through at the time this framed-up written statement was made."

1, 2. The record discloses that the confession offered and admitted in evidence was not made under the provisions of Section 1781, Or. L., and is not governed by the rule there set down. It is true, however, that, before the statutory statement made by a defendant at his preliminary examination before a committing magistrate can be admitted in evidence against him at his trial on a criminal prosecution, it must affirmatively appear that all the commands of Section 1781, Or. L., have been executed. To this effect, see *State v. Hatcher*, 29 Or. 311 (44 Pac. 484); *State v. Andrews*, 35 Or. 391 (58 Pac. 765); *State v. Scott*, 63 Or. 444 (128 Pac. 441). The alleged confession that was offered and received in evidence was made to the district attorney at his office, in the presence of the sheriff and deputy, and was no part of the preliminary examination. If the confession is admissible as evidence, it is not because of the provisions of Section 1781, Or. L., but because of the fact that it is an extrajudicial confession.

Preliminary to the introduction of the confession into the record of the trial, the sheriff testified that he was present at the defendant's preliminary examination held at Ontario on the sixteenth day of December, 1919, and, in response to interrogations put by the district attorney, testified as follows:

"Q. Immediately after the preliminary examination, what, if anything, was done?

"A. We went over for lunch first.

"Q. Who went to lunch?

"A. Yourself and Judd Heep, Bill Stevenson (defendant), Mr. Farmer, and me.

"Q. That party all go together?

"A. All together; yes, sir.

"Q. And after lunch, where did that party go?

"A. Went across and went up to your office.

"Q. Was there anything said after the preliminary by Stevenson with reference to his signing a statement of his—or a confession?

"A. Why, there was some talk in regard to it. I don't know just the words that was used. * * I don't know that I could say exactly what he said. All that was said really started from what was said over in the preliminary hearing. That whole conversation started from the statement that he made there. That was talked over after that. * * He signified his willingness to sign a statement.

"Q. I hand you this, marked State's Ex. 1, for Ident., and ask you to examine this and state if this was signed by the defendant in your presence as a witness.

"A. Yes, it was.

"Q. Was that read by the defendant before he signed it in your presence, handed to him for reading?

"A. It was handed to him for reading; yes, sir.

"Q. And did he read it, as far as you know?

"A. Well, as far as I know; yes.

"Q. Was there at that time, or at any other time in your presence, any statement made to this defendant offering him immunity or reducing his punishment, or any threats of prosecution such as to induce the making of this statement?

"A. None.

"Q. Or anything that would tend to produce such a statement?

"A. No.

"Q. And you were present at the time of it being prepared and while he signed it?

"A. I was."

Witness testified that he thought Mr. Swagler, the district attorney, wrote the statement that the prisoner

signed, and the prosecutor admitted that he prepared the writing.

Witness Farmer testified:

"Q. Were you present at all times when this confession was being prepared and while the defendant was there?

"A. Yes, sir.

"Q. Was there any promises of any nature or character offered to him if he made a confession of this character?

"A. No, sir; I think not. * *

"Q. Was there any promise of reward made to him for signing a confession or this confession?

"A. No, sir; not in my presence.

"Q. Was there any promise of immunity made to him, or protection or lessened punishment, by reason of signing that statement?

"A. No, sir; not that I know of.

"Q. Was there any threat or statements sounding like threats that induced him to sign that confession?

"A. Nothing that I seen or heard.

"Q. And you were there, present, during the time that was being prepared, in the same room, and signed as a witness immediately afterward, did you not?

"A. Yes, sir."

3. The term "confession," in criminal law, has been defined to be "the voluntary admission or declaration made by a person who has committed a crime or misdemeanor, to another, of the agency or participation which he had in the same." "Judicial confessions" are those made before a magistrate or in court in the due course of legal proceedings. "Extrajudicial confessions" are those made by the party elsewhere than before a magistrate or in open court: 1 Bouvier, 588.

4. The common-law rules governing the admissibility of confessions are still in force in Oregon.

Therefore a confession is not admissible in evidence where it is obtained by temporal inducement, by threats, fear, promise, or hope of favor held out to the party in respect to his escape from the charge against him by a person in authority: *State v. Wintzingerode*, 9 Or. 153; *State v. Garrison*, 59 Or. 440 (117 Pac. 657); *State v. Morris*, 83 Or. 429 (163 Pac. 567); *Garrard v. State*, 50 Miss. 147; *Flagg v. People*, 40 Mich. 706. It was held in the case of *State v. Moran*, 15 Or. 265 (14 Pac. 421), in an opinion by STRAHAN, J., that:

“Upon the trial of a criminal case, * * whenever a confession is offered in evidence against the accused, it becomes necessary for the court to ascertain and determine whether or not the confession has been obtained by the influence of hope or fear applied by a third person to the prisoner’s mind. This inquiry is preliminary, and is addressed to the judge.”

5. The foregoing statement of law is approved in *State v. Andrews*, 35 Or. 391 (58 Pac. 765); *State v. Rogoway*, 45 Or. 601 (78 Pac. 987, 81 Pac. 234, 2 Ann. Cas. 431); *State v. Blodgett*, 50 Or. 329 (92 Pac. 820); *State v. Spanos*, 66 Or. 118 (134 Pac. 6); and *State v. Morris*, 83 Or. 429 (163 Pac. 567). The competency of a confession as evidence is, in the first instance, addressed to the court, and its determination will not be disturbed on appeal unless the record discloses clear and manifest error: *State v. Rogoway*, 45 Or. 601 (78 Pac. 987, 81 Pac. 234, 2 Ann. Cas. 431); *State v. Blodgett*, 50 Or. 329 (92 Pac. 820); *State v. Spanos*, 66 Or. 118 (134 Pac. 6); *State v. Morris*, 83 Or. 429 (163 Pac. 567). In a specially concurring opinion in the case of *State v. Morris*, 83 Or. 429 (163 Pac. 567), Mr. Justice HARRIS says:

"This quality of voluntariness, so necessary to a confession, presents itself at two stages of a trial: (1) To the judge; and (2) to the jury. The judge passes upon the admissibility and the jurors are the exclusive judges of the weight and credibility of the confession. The decision of the judge is only preliminary while that of the jury is ultimate."

6, 7. It is urged, against the admission of the confession as evidence, that the defendant was in custody of the officers; but this fact does not render the confession any the less admissible: *State v. Rogoway*, 45 Or. 601 (78 Pac. 987, 81 Pac. 234, 2 Ann. Cas. 431); *State v. Blodgett*, 50 Or. 329 (92 Pac. 820); *State v. Scott*, 63 Or. 444, 449 (128 Pac. 441); *State v. Humphrey*, 63 Or. 540 (128 Pac. 824); *State v. Spanos*, 66 Or. 118 (134 Pac. 6); *State v. McPherson*, 70 Or. 371, 373 (141 Pac. 1018); *State v. Morris*, 83 Or. 429 (163 Pac. 567). The testimony shows that the confession was written out by the district attorney and given to the defendant to read, who signed it in the presence of two witnesses. The following is the language of Mr. Justice BEAN in speaking for this court in *State v. Morris*, 83 Or. 429 (163 Pac. 567):

"The rule is well settled that a confession taken down by someone else and read to and signed by the accused is as much his written declaration as one entirely prepared by his own hand would be; and this is true although his exact language is not reduced to writing. By signing it and adopting its language, he makes it his own."

It appears to us from the undisputed testimony of the witnesses that the confession offered and received in evidence was an extrajudicial confession, made by the defendant to the district attorney, and fully meets the requirements of law as to competency.

The next and only remaining question relates to the procedure in the prosecution of the crime of adultery. Who can institute a prosecution for the crime of adultery in this state when both parties to the offense are married? Section 2072, Or. L., provides, among other things, as follows:

“A prosecution for the crime of adultery shall not be commenced except upon the complaint of the husband or wife.”

This clause of the adultery statute in substantially its present wording, first appeared in the Code of 1853, prepared by the Code commission authorized by an act of the territorial legislative assembly passed in January, 1853, entitled “An Act to Create a Board of Commissioners to Prepare a Code of Laws for the Territory of Oregon.”

What constitutes the statutory offense of adultery, or the procedure for the prosecution thereof, has not received uniform decision among the courts of the several states of the Union. The difference of opinion among the courts as to what constitutes the offense or what is the proper procedure in the prosecution of the crime of adultery generally arises from the fact that the decisions are founded upon Codes of law materially different from each other. Accordingly, the doctrine announced in a particular case is dependent upon an individual statute under which the defendant is being prosecuted: *Commonwealth v. Call*, 21 Pick. (Mass.) 509 (32 Am. Dec. 284); *State v. Lash*, 16 N. J. Law, 380 (32 Am. Dec. 297); 1 Cyc. 953. While the crime of adultery is an offense against both the state and the innocent spouse in this state, yet according to the provisions of the statute of Oregon no grand jury can indict, nor can any person file an information before a magistrate charging

another with the crime of adultery unless such prosecution is commenced upon the complaint of the husband or wife, excepting when the crime has been committed with an unmarried female under the age of 20 years, then upon the complaint of the wife, or of a parent or guardian of such unmarried female. A provision prohibiting the commencement of a prosecution for the crime of adultery except upon the complaint of the husband or wife may be found in the statute of Washington, Iowa, Michigan, Minnesota, and North Dakota. The following cases illustrate the diversity of opinion relating to the competency of the complaining witness under like statutes: *State v. La Bounty*, 64 Wash. 415 (116 Pac. 1073); *State v. Astin*, 106 Wash. 336 (180 Pac. 394, 4 A. L. R. 1336); *State v. Roth*, 17 Iowa, 336; *Bush v. Workman*, 64 Iowa, 205 (19 N. W. 910); *State v. Loftus*, 128 Iowa, 529 (104 N. W. 906); *Bayliss v. People*, 46 Mich. 221 (9 N. W. 257); *People v. Davis*, 52 Mich. 572 (18 N. W. 362); *People v. Dalrymple*, 55 Mich. 519 (22 N. W. 20); *Wilson v. Daboll*, 104 Mich. 155 (62 N. W. 293); *State v. Brecht*, 41 Minn. 50 (42 N. W. 602); *State v. Wesie*, 17 N. D. 567 (108 N. W. 20, 19 L. R. A. (N. S.) 786). While passing, we will observe that under statutes similar to ours, providing that when the crime of adultery is committed between a married woman and an unmarried man, the man shall be deemed guilty of adultery, the prosecution may be instituted upon the complaint of the spouse of the woman with whom the crime was committed: *State v. Ayles*, 74 Or. 153 (145 Pac. 19, Ann. Cas. 1916E, 738); 1 Standard Proc. 598, citing *State v. Corliss*, 85 Iowa, 18 (51 N. W. 1154); *State v. Maas*, 83 Iowa, 469 (49 N. W. 1037); *State v. Mahan*, 81 Iowa, 121 (46 N. W. 855); *State v. Wil-*

son, 22 Iowa, 364; *People v. Davis*, 52 Mich. 569 (18 N. W. 362); *Bayliss v. People*, 46 Mich. 221 (9 N. W. 257); *Commonwealth v. Vance*, 29 Pa. Co. Ct. 257; *Commonwealth v. Nick*, 29 Pa. Co. Ct. 8. Undoubtedly this is the law in Oregon.

Concerning the right to institute a prosecution, as in the case at bar, where both offending parties are married, there is a conflict of authorities construing statutes that are alike. The provision of the statute that requires the prosecution to be instituted by the husband or wife of one of the offenders has been held to mean that the proceedings may be set in operation against one or both of the offending spouses by the husband or wife of either. This rule was adopted by the Supreme Court of Michigan and followed by Minnesota and thence by North Dakota. The cases of *Bayliss v. People*, 46 Mich. 221 (9 N. W. 257), *State v. Brecht*, 41 Minn. 50 (42 N. W. 602), and *State v. Wesie*, 17 N. D. 567 (118 N. W. 20, 19 L. R. A. (N. S.) 786), are in point. Upon the other hand, the rule in Iowa declares that, in a case of adultery where both offenders are married, the complaint must be made by the husband or wife of the offender proceeded against: *State v. Roth*, 17 Iowa, 336; *State v. Mahan*, 81 Iowa, 121 (46 N. W. 855); *Bush v. Workman*, 64 Iowa, 205 (19 N. W. 910); *State v. Oden*, 100 Iowa, 22 (69 N. W. 270). This provision found in the Iowa statute, as interpreted by the early case of *State v. Roth*, 17 Iowa, 336, limits the right to commence a prosecution for adultery to the husband or wife of the guilty party; and the commencement of the prosecution by the husband or wife of one party against his or her offending spouse does not authorize a prosecution against both. The Iowa statute provides that no "prosecu-

tion for adultery can be commenced, but on the complaint of the husband or wife." The court said:

"This question is not only *res integra*, but it is *sui generis*, and so far as we have been able to extend our investigations, it has no parallel in the common or statute law, and is, therefore, purely an original question, to be decided without the aid of precedent.

"Adultery, though in England cognizable criminally under the ecclesiastical law, was not indictable at the common law, and is not therefore punishable in this country, where we have no established religion, except it is made so by statute. * *

"Was this provision (providing that 'no prosecution for adultery can be commenced but on the complaint of the husband or wife') incorporated in the statute simply to protect the partner or family from the public scandal attending the prosecution for the offense, or was it also in view of the fact that the penalty could not be visited upon the guilty party of such marriage, without, at the same time, in almost an equal degree, visiting it upon the innocent partner? Or, did the legislature regard the offense as primarily against the family, as tending to impose on the marriage a spurious issue, and as incidental only in its consequences to the public, and therefore left it with the innocent partner to demand the enforcement of the penalty or not, at pleasure? * *

"What can be intended by the use of the definite article 'the,' preceding husband or wife, unless it refers to the husband or wife of the party against whom the prosecution is commenced. The object of the limitation of the statute, in our view, was to exempt the party from prosecution, unless the husband or wife of such party should commence the prosecution against him or her."

This case has been cited and followed in many subsequent Iowa cases and has generally been followed by the Circuit Courts of Oregon. In the case of *Bush v. Workman*, 64 Iowa, 205 (19 N. W. 910), the

Supreme Court of that state, by opinion, held, with reference to the statute providing that "no prosecution for adultery can be commenced but on the complaint of the husband or wife," that—

"It cannot be doubted that the words 'husband or wife' refer to and mean the spouse of the person charged with the offense. The statute is express and plain in its language, and its meaning cannot be misunderstood. It forbids prosecutions for adultery, except when commenced by the spouse of the person prosecuted."

Such provisions restricting the prosecution of the offense to the aggrieved husband or wife of the defendant are said to be grounded in the regard which the law has for the marriage relation and the right of the husband and wife to condone the wrongs of either toward the other: *State v. Corliss*, 85 Iowa, 18 (51 N. W. 1154); *State v. Andrews*, 95 Iowa, 451 (64 N. W. 404); *State v. Oden*, 100 Iowa, 22 (69 N. W. 270). The recent cases of *State v. Astin*, 106 Wash. 336 (180 Pac. 394, 4 A. L. R. 1335), and *State v. La Bounty*, 64 Wash. 415 (116 Pac. 1073), seem to support the Iowa rule. In the latter case Judge DUNBAR, speaking for the Supreme Court of the State of Washington, in discussing the reason for providing that a prosecution of that case could be commenced only upon the complaint of the husband or wife, said:

It was "the * * intention of the legislature which incorporated the provisions into the law" to regard adultery "as a crime against the husband or wife personally, rather than as a crime against society, leaving the husband or wife * * to condone the offense if he or she desired so to do, unembarrassed by the publicity incident to the prosecution instituted by the officers of the state."

In *State v. Astin*, 106 Wash. 336 (180 Pac. 394, 4 A. L. R. 1335), the most recent case here cited, Judge MACKINTOSH held, regarding the statute limiting the commencement of the prosecution to the complaint of the injured spouse, that—

“The purpose of the act is, as stated in the case of *State v. La Bounty*, * * to put the commencement of the prosecution in the exclusive control of the injured spouse, in order that reconciliation might take place free from publicity and notoriety.”

8. We will now search for the legislative intent, which is always controlling in the construction of a statute. It has been said that “a legislative act is to be interpreted according to the intent of the legislature apparent upon its face”; also, that “the intent of the lawmaker is the law”; and that the “primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he has used”: Rule 17, Statutes and Statutory Construction, by Charles C. Moore, 1 Fed. Stat. Ann. (2 ed.), and authorities there cited.

The fact that the highest courts of the different states we have mentioned differ as to the meaning of this clause of the adultery statute tends to prove that doubt exists as to its import. In view of the conflict of the decisions of the courts, we will assume that the meaning of this clause is not plain, and call to our aid the history of the legislation, the legislative interpretation, and the practical construction given this provision of the adultery statute in Oregon. On June 5, 1843, the legislative committee of the provisional government of Oregon made a report to the people recommending that—

“The laws of Iowa territory shall be the law of this territory, in civil, military, and criminal cases; where

not otherwise provided for, and where no statute of Iowa territory applies, the principles of common law and equity shall govern."

This report was adopted by the people on July 5, 1843. The laws of Iowa thus adopted by the people were "the statute laws of the territory of Iowa, enacted at the first session of the legislative assembly of said territory, held at Burlington, A. D. 1838-39; published by authority, DuBuque, Bussel, and Reeves, Printers, 1839": Oregon Archives, pp. 30, 31, and 32. The Centennial History of Oregon, pp. 174, 182.

In the Iowa Code, Section 85 of an act defining crimes in the territory of Iowa became, by adoption, the first law in Oregon denouncing the crime of adultery.

On June 27, 1844, the legislature of the provisional government passed an act which provided, among other things, that—

"All the statute laws of Iowa Territory passed at the first session of the legislative assembly of said territory, and not of a local character, and not incompatible with the condition and circumstances of this country, shall be the law of this government, unless otherwise modified; and the common law of England and principles of equity, not modified by the statutes of Iowa or of this government, and not incompatible with its principles, shall constitute a part of the law of this land": Laws of Oregon of 1843-49, p. 100.

The fourteenth section of the act of Congress of August 14, 1848, c. 177, 9 Stat. 323, organizing the territory of Oregon, continued these laws of provisional government in force until they should be altered or repealed: General Laws of Oregon, 1843-72; Deady and Lane Code, p. 60. The legislative assembly of Oregon Territory, September 29, 1849, adopted the revised laws of Iowa of 1843. The Code

last adopted was known as the Revised Statutes of the territory of Iowa, revised and compiled by a joint committee of legislative session of 1842-43 and arranged by the Secretary of the Territory, published by authority at Iowa City, and printed by Hughes & Williams, 1843. Section 21 of an act defining crimes and punishments, in the Revised Code, defined the crime of adultery and, prescribing the punishment therefor, amended the previous adultery statute materially. Due to a decision of the Supreme Court of the territory, doubt was raised as to which of the Iowa Codes mentioned constituted the laws of Oregon. The three territorial judges disagreed.

"The result of these conflicting views of the judges was that in Judge Nelson's judicial district, composed of Clackamas, Marion, and Linn counties, and in Judge Strong's district, composed of Clatsop County and the counties North of the Columbia River, the Iowa Code of 1838, adopted by the Provisional Government, was held to be in force. Judge Pratt's district, composed of all the territory West of the Willamette River, included the counties of Washington, Yamhill, Polk, and Benton, and in this district the 'Chapman Code' of the Revised Code of Iowa Statutes of 1843 was recognized as the law in force. In the district of Nelson and Strong, the lawyers would cite the law from the 'Little Blue Book,' as the volume of Statutes of Iowa of 1838 was called. In Judge Pratt's district the same lawyers would quote from the 'Big Blue Book,' as the Iowa Code of 1843 was called." Oregon Historical Society, Volume 4, page 188. Article by Hon. James K. Kelly.

It was this dispute that gave rise to the appointment of the Code commission authorized and appointed by the legislative session of 1853, who prepared the Oregon Code of 1853, which commission consisted of James K. Kelly of Clackamas

County, Chairman, Reuben P. Boise of Polk County, and Daniel R. Bigelow of Thurston County. Judge Kelly, in the article referred to in the Oregon Historical Journal, states that—

“It was agreed among us that Mr. Boise should prepare the act relating to executors and administrators, and also proceedings in the probate courts.

“To Mr. Bigelow was assigned the duty of preparing the act relating to crimes and misdemeanors, and to regulate criminal proceedings.

“I undertook to prepare the Code of Civil Procedure in actions at law and suits in equity.”

The commission gathered material for the Code of 1853 from different sources. That part of the Oregon statute relating to the manner of commencing and prosecuting actions at law was taken from the New York Code. It is commonly asserted that the adultery statute of the Code of 1853, wherein the clause relating to the commencement of the prosecution first appears in Oregon, was taken from the Iowa Code of 1851. We have no positive proof that this is true; but by a comparison of Chapter 11 of the Criminal Code of Oregon prepared by the commission of 1853, denouncing a list of offenses against “chastity, morality and decency,” with a list of acts condemned as “offenses against chastity, morality and decency” by Chapter 145 of the Iowa Code of 1851, we believe that there is much reason for the claim.

The adultery statute as provided in the Code of 1853, remained unchanged until the adoption of the Criminal Code of Oregon annotated and compiled by M. P. Deady. This Code was prepared and reported to the legislative assembly that met September 12, 1864. It was passed as reported at the same session,

and took effect as declared in Section 731, May 1, 1865: Note, Deady Code, p. 441. This statute was divided into two sections by Judge DEADY, the phraseology changed, the jail penalty added, the minimum fine raised, and the words, "or the time when the same shall come to the knowledge of the husband or wife," added. But the clause under consideration was in no way altered. This statute appears in the Deady and Lane Code, and in the first Hill Code, unchanged. The legislature of 1891 re-enacted one section of this statute, and amended it by providing for the prosecution of a married man who commits the crime of adultery with an unmarried female under the age of 20 years, which act now appears as Section 2072, Or. L.

Prior to the legislative session of 1891, the clause providing that "a prosecution for the crime of adultery shall not be commenced except upon the complaint of the husband or wife" had received numerous interpretations by the Circuit Courts of this state. The legislature re-enacted said section, without change other than noted, after the courts had long construed this clause to mean that no prosecution for the crime of adultery should be commenced except upon the complaint of the husband or the wife of the defendant when both parties to the crime were married. This is an important fact in looking for legislative intent.

"A construction made by the body charged with the enforcement of a statute, which construction has long obtained in practical execution, and has been impliedly sanctioned by the re-enactment of the statute without alteration in the particulars construed, when not plainly erroneous, must be treated as read into the statute": *New York, N. H., etc. R. Co. v. Interstate Commerce Commission*, 200 U. S. 361 (50 L. Ed.

515, 26 Sup. Ct. Rep. 272, see, also, Rose's U. S. Notes); Endlich on Inter. Statutes, § 367; *State v. Schenk*, 238 Mo. 429 (142 S. W. 263).

9. It will be remembered that the Circuit Courts of Oregon have almost invariably followed the Iowa rule, notwithstanding the fact that this clause of the adultery statute of Oregon antedates the case of *State v. Roth*, 17 Iowa, 336, some 10 years. As illustrative of the rulings of the Circuit Courts of Oregon, we will take the case of *State v. Collins*, heard in the Circuit Court of the State of Oregon in and for Marion County, wherein the circuit judge observed that the court followed the Iowa rule because of the "good reasoning contained in the opinion of *State v. Roth*, 17 Iowa, 336," and that "in fact we had at one time adopted the Code of Iowa." The constructions placed upon this statute by the Circuit Courts of this state do not bind this court, but the rulings are persuasive, and where the construction has been almost uniform for a period of more than half a century, it should not be set aside without very grave reason therefor.

"It is a well-settled rule that the contemporaneous construction of a statute by those charged with its execution, especially when it has long prevailed, is entitled to great weight, and should not be disregarded or overturned except for cogent reasons, and unless it be clear that such construction is erroneous": *Biggs v. McBride*, 17 Or. 640 (21 Pac. 878, 5 L. R. A. 115); *Kelly v. Multnomah County*, 18 Or. 356 (22 Pac. 1110); Rule 56, Statutes and Statutory Construction, 1 Fed. Stats. Ann. (2 ed.), and numerous cases under note 56.

10. We hold the law of this state to be that when the crime of adultery has been committed between a married man and a married woman, as in the in-

stant case, the right to complain and institute a prosecution upon a charge of adultery against either of the guilty parties is the exclusive privilege of the unoffending wife or husband of the defendant proceeded against.

It is the order of this court that the judgment of the court below is reversed, and the case is remanded, with direction that the appellant be discharged from further prosecution of the pending indictment.

REVERSED WITH DIRECTIONS.

BENSON, J., not sitting.

Argued October 5, affirmed November 9, rehearing denied December 21, 1920.

ADAMS v. KING.

(193 Pac. 196.)

Animals—Evidence Held to Show Negligent Feeding.

1. Evidence held to support a finding that defendant was negligent in performing his agreement to hand feed cattle.

Appeal and Error—Findings on Conflicting Evidence not Disturbed.

2. If there was any substantial evidence upon which to base the findings and judgment of the trial court, the Supreme Court will affirm the judgment, for it is not within its province to decide a controverted question of fact decided by trial court on conflicting testimony.

From Multnomah: ROBERT G. MORROW, Judge.

Department 1.

Ivan King owned a farm on Sauvies Island. The farm embraced about 510 acres. C. G. Adams owned forty-two head of cattle, of which three were calves, and most, if not all, of the remainder were cows. King agreed to "pasture and hand feed" the cattle

from November 1, 1917, to May 1, 1918. Adams agreed to pay \$1 "per head for said cattle while on pasture," and \$1.50 "per head while being hand fed hay." Adams agreed to furnish the hay and to deliver it at King's landing.

The cattle were driven to King's farm on or about November 1, 1917. On about May 1, 1918, King returned to Adams only thirty-two head of the cattle, nine cows and one calf having died between November 1, 1917, and May 1, 1918.

Adams sued King for the value of the cattle that died, alleging that their loss was caused by King's negligence in not properly looking after the cattle and in not properly feeding them.

The parties consenting, the cause was tried to the court without the aid of a jury. The trial court found that the "defendant did not give to said cattle the reasonable and usual care given by persons engaged in the same line and occupation of pasturing and feeding cattle," and that the "cattle were lost through the negligence of defendant." The trial court also found as a fact that—

"The plaintiff in accordance with the requirements of said agreement upon him resting duly supplied sufficient and an abundance of hay to be fed to said cattle and delivered same at the landing of the defendant where said hay was received by the defendant."

There was a judgment for the plaintiff, and the defendant appealed.

AFFIRMED.

For appellant there was a brief over the names of *Mr. George Estes* and *Mr. J. H. Hobart*, with an oral argument by *Mr. Estes*.

For respondent there was a brief and an oral argument by *Mr. D. Solis Cohen*.

HARRIS, J.—The only complaint now made by the defendant is that there was no evidence to support the judgment. The agreement was “to pasture and hand feed,” and, although there was no express provision in the agreement stating when the cattle were to be hand fed, yet it was assumed by the parties that the obligation to hand feed did not arise until the arrival of such time as a reasonably prudent man would, because of the lack of grass, have resorted to hand feeding. The cause was prosecuted by the plaintiff and decided by the court on the theory that the defendant was negligent in not properly performing his obligation to hand feed the cattle.

1, 2. We cannot agree with the contention of the defendant, so ably argued by his attorney, that there is no evidence in the record to support the finding that the defendant was negligent in respect of his agreement to hand feed the cattle. If there was any substantial evidence upon which to base the findings and judgment of the trial court, then we are obliged to affirm the judgment, for it is not within our province to decide a controverted question of fact which has already been decided by the trial court upon conflicting testimony.

There is evidence in behalf of the plaintiff to the effect that the cattle “were in good condition to go into the winter.” There is evidence from which the plaintiff argues that when the cattle were taken to the King farm they were placed on pasture lands and kept there for a few weeks, and that at the end of that time a portion of the cattle “were brought in,” and that later on the remainder of the cattle were brought to the feeding barn. According to Adams, the cattle which were last brought to the feeding barn were “in a horrible weak condition.” Mrs.

Ellen Dunn, who resided on land adjoining one end of the King premises, saw the cattle before they were taken to the feeding barn, and she says that she "noticed there wasn't any pasture," and that the cattle were neglected, and that for several days her husband carried feed from their place and gave it to the weaker cows. Mrs. Dunn's testimony was corroborated by Jacob C. Clark; and, indeed, the condition of the cattle was such as to cause Clark to complain to "some of them" that "it was a shame to see cattle in the condition they were." The defendant argued that there is no evidence to indicate that the cattle, of which Mrs. Dunn and Jacob C. Clark spoke, were the Adams cattle. The evidence indicates that there were no cattle on the King premises except the Adams cattle and cattle owned by King. The evidence shows clearly, including the testimony of defendant himself, that the Adams cattle, when pastured and before "brought in," were pastured on that part of the King premises which adjoins the Dunn farm, while the King cattle were kept at the other end of the King premises, or about a mile from the place where the Adams cattle were pastured. The defendant when a witness did not claim that any of the cattle were infected with disease or that any of them died from any disease. The King cattle were kept and fed separately from the Adams cattle. It is admitted that none of the King cattle died.

In addition to evidence tending to show that the defendant was negligent in leaving the cattle on the pasture too long and in not sooner hand feeding them, there is evidence from which the plaintiff contends that the cattle were not properly fed. There was evidence to the effect that the hay-racks were so arranged that the cattle could not get to them with

the result that the "boss cattle" "whipped out" the weaker ones and prevented them from getting any of the hay. Again, there was evidence that the hay was put in only a portion of the racks and not scattered along the full length of them. In brief, there was substantial evidence to support the charge made by the plaintiff that the defendant did not use ordinary care in caring for and feeding the cattle. There was also, it is true, substantial evidence tending to controvert the charge made by the plaintiff, and tending to support the position taken by the defendant that he had used proper care in looking after and feeding the cattle.

We have then before us a record, which shows that there was substantial evidence in behalf of the plaintiff and also substantial evidence for the defendant, with the result that there is a conflict in the evidence; and, therefore, since the only question presented upon this appeal is whether or not there was sufficient evidence to sustain the judgment, the findings made by the trial judge are conclusive upon us, and the judgment appealed from must be affirmed.

AFFIRMED. REHEARING DENIED.

McBRIDE, C. J., and BURNETT and JOHNS, JJ., concur.

Argued at Pendleton October 27, appeal dismissed December 21, 1920.

RICHMOND v. WHITE.

(193 Pac. 1026.)

Appeal and Error—Transfer of Property Adjudicated to Party Waived Right of Appeal.

1. Where a suit for accounting by landlord against tenant renting on shares the effect of the court's decision was to give tenant credit for property which he purchased and paid for, but which landlord should have purchased, leaving title to the property in landlord, a transfer after oral decision, but before entry of decree by the landlord, of the leased premises, including the property adjudicated to landlord, waived the right to appeal, though it was also decided that the lease continued for several years longer, and the landlord's deed warranted against encumbrances, which warranty, however, was obviated by contemporaneous contract by grantees that tenant's occupancy was to be excluded from the operation of warranty.

From Gilliam: DAVID R. PARKER, Judge.

In Banc.

'Action by J. A. Richmond against J. B. White and another. From the decree rendered, plaintiff appeals, and the named defendant moves to dismiss the appeal.

APPEAL DISMISSED.

For appellant there was a brief and an oral argument by *Mr. John W. Kaste*.

For respondents there was a brief over the names of *Mr. T. W. Weinke* and *Mr. G. E. Hamaker*, with an oral argument by *Mr. Weinke*.

HARRIS, J.—J. A. Richmond, the plaintiff, owned a wheat farm embracing 1,480 acres in Gilliam County. About October 1, 1917, S. G. Potter and the defendant J. B. White entered upon the farm as ten-

ants of Richmond, with the understanding that, after first deducting sufficient wheat for feeding and seeding, Richmond should receive as rental one half of the wheat grown on the premises. At some time prior to the harvesting of the 1918 crop, White and Potter dissolved their interests and adjusted their affairs, and, with the consent of Richmond, Potter retired and left White as the sole tenant for 1918. White did not leave the farm in 1918, but remained on the premises and sowed and harvested a crop for 1919. On November 10, 1919, Richmond began this suit for an accounting against White and the Condon National Bank. The bank was nowise interested, except as a holder of \$4,198.08, which it had received as proceeds of the sale of some of the wheat. White had hauled Richmond's share of the wheat to a warehouse, and, according to the contention of Richmond, White sent to Richmond the warehouse receipts for Richmond's share of the wheat. Richmond says that he then sent the receipts to the bank with directions to sell the wheat. The bank followed directions, sold the wheat, and received \$4,198.08 for it. The bank alleges that, when it learned that there was some controversy between Richmond and White about these moneys, it executed a certificate of deposit payable to the order of Richmond and White; and the bank declared that it made no claim to the moneys, but simply held them for whomsoever might be entitled to receive them.

Richmond says in his complaint that in September, 1917, he leased the farm to White and Potter for one crop season ending October 1, 1918, with the further understanding that, if the premises were farmed in accordance with the agreement and in a manner satisfactory to Richmond, he would enter into a written agreement leasing the farm to White and Potter for

a term of four years. White asserted that Richmond leased the premises to White and Potter for a period of five years from January 1, 1918, and that it was also agreed that White and Potter should immediately enter into possession of the farm and that Richmond should, as soon as he could, prepare a writing evidencing the terms of the agreement.

Richmond asked in his complaint that White be required to account for the wheat raised in 1918 and 1919; for eight brood sows and twenty-five shoats alleged to have been killed by White; for pasturing and feeding certain stock; for barley raised in 1918; for failure to stack the straw; and for neglect to keep the buildings, fences, and equipment in repair.

White answered by claiming that he had accounted to Richmond for his full share of the crops. White's answer also contained a number of counterclaims. It was alleged by White that Richmond agreed "to furnish for the use of the defendant and said S. G. Potter on said farm" certain items of farm machinery and equipment specifically enumerated in the answer; that Richmond failed to furnish some of these items; and that because of such failure it became necessary for White to buy some of the items and to hire others at an expense of \$4,601.35 in order to save the crop in 1918.

White was living on a farm in Washington owned by Richmond; and from there White moved to Richmond's farm in Gilliam County. White averred that he owned certain personal property on the Washington farm, and that he left this personal property on the Washington farm for Richmond with the understanding that Richmond would deliver like property on the Oregon farm for White; that Richmond failed

to keep his agreement to the damage of White in the sum of \$662.

White also claimed that he was entitled to receive 25 cents per sack, or a total of \$288.55 for hauling Richmond's share of the 1918 crop to the warehouse.

There was an additional further and separate answer and defense in which White asked that Richmond be required specifically to perform and to execute and deliver a writing evidencing the agreement.

The trial court found that Richmond made no claim to the personal property left by White on the Washington farm, and that White was the sole owner of that personal property, and hence no allowance was made to White on account of that property.

The court further found that the leasehold agreement was as alleged by White, and that the lease was for a term of five years from January 1, 1918; that Richmond agreed to furnish the items of farm machinery and equipment as alleged by White, but that, because of the failure of Richmond to keep his agreement in this respect, White had been obliged at his own expense to buy and hire such machinery and equipment. The trial court charged White with \$7,214.79 as the value of Richmond's share of the wheat, and credited White with \$6,332.90, leaving a balance of \$881.89 due Richmond from White, and included among the credits were the items of machinery and equipment which White had purchased after Richmond had failed to furnish them.

The court rendered a personal money decree against the bank in favor of White for the sum of \$3,316.19, together with costs and disbursements amounting to \$46.10, and a like decree against the bank in favor of Richmond for the sum of \$820.79, and allowed the bank \$15 for its costs and disburse-

ments, thus disposing of all the moneys held by the bank as stakeholder.

Richmond appealed. White has moved to dismiss the appeal on the ground that Richmond has accepted the benefits of the decree and has ratified it.

The record shows that, when the parties concluded offering their evidence and rested, the circuit judge stated orally in open court, on March 18, 1920, that he was prepared to decide the case at once, but in order to give the parties an opportunity to adjust their differences he would postpone announcement of his decision until that evening. A written decision and decree were not filed, however, until April 27, 1920. Richmond took his initial step towards an appeal by serving notice of appeal on June 17, 1920.

On March 29, 1920, Richmond and his wife, by a warranty deed, conveyed the Gilliam County farm to W. S. Powell and Roy Powell. The deed contains a covenant that the premises "are free from all encumbrances, except a mortgage for \$15,000."

Contemporaneously with the execution of the deed and as a part of the same transaction another writing was prepared, and it was signed by J. A. Richmond together with W. S. Powell and Roy Powell. This instrument contains a number of preliminary recitals. The first recital mentions the conveyance of the farm to the Powells. The second recital declares that White and Potter "are now in occupancy of said ranch claiming and asserting their right to possession thereto for an unexpired period." The third recital refers to "the decision of the Circuit Court" rendered "in the cause of" Richmond against White and the Condon National Bank. The fourth recital declares that "it is the intention of" Rich-

mond and his wife that the Powells "shall be vested with all the rights, title, claims, or interest which the said John A. Richmond has or claims to have in or to said premises, all personal property and also claims and rights of action against the said J. B. White arising from any cause whatsoever." These recitals are followed by the declaration that Richmond does "hereby sell, assign, and transfer unto the said W. S. Powell and Roy Powell the said claim of \$2,000 above described due and owing to him from the said J. B. White, also any other cause or causes of action which the said John A. Richmond now has or claims to have against the said J. B. White by reason of said J. B. White's occupancy of said premises, and in consideration thereof the said W. S. Powell and Roy Powell have purchased said premises subject to the occupancy of the said J. B. White and S. G. Potter, and hereby agree to hold the said John A. Richmond and Florence S. Richmond harmless from any claim for damages by reason of the warranties contained and recited in their warranty deed other than as to title."

At some time in April, 1920, the Powells informed White that they had purchased the farm and personal property. White, after having been shown that the Powells were the owners of the premises and personal property, attorned to the Powells. The Powells made an affidavit in which they say they purchased from Richmond all the personal property on the farm, including the items which White had bought and the court had charged against Richmond. Attached to this affidavit is a copy of the bill of sale and a copy of the memorandum which the Powells say "is part and parcel of the" bill of sale. The memorandum itemizes the articles which the Powells aver they pur-

chased from Richmond; and among the items are those purchased by White and charged to Richmond in this suit.

On September 25, 1920, the Powells leased the farm to White for a term of two years, beginning with September 15, 1920, and ending September 15, 1922. Contemporaneously with the execution of this lease Powells gave to White a bill of sale for all of the personal property.

It will be remembered that the deed from Richmond to the Powells contains a covenant warranting the farm against all encumbrances, except a mortgage of \$15,000. It will also be recalled that the trial court decreed that White had a lease on the farm for a term of five years. Richmond now argues that this appeal cannot be dismissed for the reason that the leasehold estate decreed by the trial court constitutes an encumbrance, and that he is entitled to maintain this appeal so as to free himself from liability on his covenant of warranty. The answer to this argument of the plaintiff is found in the writing which Richmond and the Powells signed as a part of the transaction; for it will be remembered that in that writing Powells purchased the farm "subject to the occupancy of" White and Potter, and that the Powells also expressly agreed to hold Richmond "harmless from any claim for damages by reason of the warranties contained and recited in their warranty deed other than as to title." Moreover, White's leasehold agreement with Richmond was extinguished when he entered into the agreement of September 25th with the Powells.

The decree of the trial court in effect said to Richmond:

"You did not furnish certain items which you agreed to furnish; and, because you did not furnish

them, White was obliged to buy them. Now, since White did for you what you should have done for yourself, you must reimburse White, and the items purchased by White will therefore be treated as your property. In other words, White had a right to buy and charge to you what you should have furnished, but did not furnish."

One of the issues in this suit was whether White was entitled to charge Richmond for the items purchased by White. Richmond knew when he signed the writing which dealt with the personal property, what the court had orally decided, although the written decision had not yet been filed; for there is a recital in the writing expressly referring to the "decision." The writing states that "it is the intention of" Richmond to vest all the right which Richmond "has or claims to have in and to said premises, all personal property, and also all claims and rights of action against the said J. B. White arising from any cause whatsoever."

Richmond cannot complain that the lease decreed by the court is an encumbrance for which he is liable, for the Powells expressly agreed that the occupancy of White and Potter was to be excluded from the operation of the warranty, and, moreover, the decreed lease was extinguished when White leased directly from the Powells, and, furthermore, Richmond cannot now complain about that part of the decree which relates to the personal property and to the claims made by him against White, for he has submitted to that part of the decree.

The appeal is dismissed.

APPEAL DISMISSED.

Argued at Pendleton October 27, affirmed December 21, 1920.

JOHNSON v. HOMESTEAD-IRON DYKE MINES CO.

(193 Pac. 1036.)

Pleading—Facts Stated in Complaint Assumed True on Motion to Elect.

1. For the purpose of considering defendant's motion to compel plaintiff to elect upon which of his alleged causes of action he will rely, the facts stated in the complaint are assumed to be true.

Pleading—Election not Compellable Unless Duplicate Recovery Possible.

2. Plaintiff will not be required to elect upon which of his alleged causes of action he will rely where, under the complaint, there cannot be duplicate recovery for the same cause of action.

Appeal and Error—Denial of Motion to Elect Held not Reversible Error Under Statute.

3. Even if plaintiff, under Section 67, Or. L., should have stated two alleged causes of action in one count, his failure to do so held not ground for reversal, under Sections 85 and 107, because of denial of defendant's motion to compel election; defendant having suffered no prejudice by the ruling.

Contracts—Complaint for Breach of Hauling Contract Held not Demurrable.

4. In action for breach of hauling contract, complaint held not demurrable.

Contracts—Mutuality Required.

5. A promise made by one party without a corresponding consideration, obligation or promise made by the other is void.

Contracts—To be Construed as a Whole.

6. A contract must be construed as a whole; every paragraph, every sentence, clause, phrase and word must be considered in interpreting its meaning.

Contracts—Option to Continue Hauling Contract not Void for Want of Mutuality.

7. Provision in concentrates hauling contract that, after 1,600 tons of concentrates had been hauled, the contractor should have the preference right to continue hauling so long as the other party had any hauling to be done, was not void for lack of mutuality where the contractor purchased a motor truck, hauled 1,600 tons, exercised his preference right, and continued to haul until he had transported 4,300 tons, when the other party attempted to rescind.

Contracts—Unilateral Contract may be Made Mutual by Performance.

8. Where the promise consists of the doing of an act by another, and the latter does the act, the contract is not void for want of mutuality.

Contracts—Adequacy of Consideration not Inquired into.

9. The law will not inquire as to the adequacy of a consideration, but anything which fulfills the requirements of consideration will support a promise, whatever may be the comparative value of the consideration and of the thing promised.

Damages—Lost Profits must be Proved by Definite Data.

10. Where loss of profits from breach of contract is sought to be recovered, such probable profits must be established by proof of data from which the extent of the profit, if any, may be ascertained.

Contracts—"Unavoidable Serious Accident" Defined.

11. In a contract barring liability for delays caused by "unavoidable serious accidents," such an accident means unusual, unexpected and unintended occurrence, not brought on by failure to exercise ordinary care and prudence, and of such character that the parties could not reasonably have contemplated the same at the time of the contract to take adequate precautions to prevent it by the exercise of ordinary diligence, prudence and foresight, and which causes such interference and resulting delay as could not by such diligence, prudence and foresight have been avoided.

Contracts—Whether Delay Excusable as Caused by Unavoidable Serious Accident Held for Jury.

12. Under a concentrates hauling contract, barring delays caused by unavoidable serious accidents, where the contractor's truck, while hauling a load of concentrates, for some unexplained reason, and without negligence of the contractor or his agents, left the road and rolled down a steep embankment, injuring the driver and damaging the truck, and the accident, according to the evidence, resulted in some delay, whether such delay was excusable as caused by an unavoidable serious accident was for the jury.

Appeal and Error—Under the Constitution, Verdict Supported by Some Evidence not Reviewable.

13. Under Article VII, Section 3, of the Constitution, the Supreme Court will not re-examine a cause or fact tried by a jury, unless the court can affirmatively say there is no evidence to support the verdict.

From Baker: GUSTAV ANDERSON, Judge.

When loss of profits an element of damages, see note in 60 *Am. Rep.* 488.

Right to recover profits as damages for breach of contract where profits are very object of contract, see note in *Ann. Cas.* 1914D, 36.

10. On loss of profits as element of damages for breach of contract, general rules applicable to all kinds of contracts, see note in 53 *L. R. A.* 34.

In Banc.

This is an action prosecuted by Percy M. Johnson against Homestead-Iron Dyke Mines Company, a corporation, operating a mine at Homestead, Baker County, Oregon, for breaching a contract to haul concentrates.

The town of Homestead is the terminus of what is known as the Homestead Branch of the Oregon Short Line Railroad Company, which connects Homestead with Huntington. Between the stations of Homestead and Oxbow the railroad passes through a tunnel 2,300 feet in length. Near the north end of the tunnel is situated the town of Copperfield; at the south end thereof, the town of Oxbow. There is a private wagon road connecting Huntington, Copperfield, and Oxbow, that passes through a small tunnel about 75 feet in length which caved in during the time plaintiff was attempting to fulfill the terms of his contract. Prior to February 11, 1919, the timber in the large tunnel was destroyed by fire. By reason thereof the defendant company was prevented from shipping its products by rail from Homestead to Huntington and thence to Utah, as was its practice. On February 11, 1919, Percy M. Johnson, plaintiff and respondent herein, made and entered into a contract with the defendant and appellant, the Homestead-Iron Dyke Mines Company, a corporation, to transport the concentrates produced by the defendant company at its mine at Homestead to the town of Oxbow. Among the provisions of the contract executed between the parties we set out the following:

“(3). The Company agrees to pay the Contractor the sum of four Dollars (\$4.00) per short ton for each and every ton of said concentrates or other

materials hauled from Homestead to Oxbow; said payment to be made in the following manner, to wit:

"Eighty per cent (80%) of said price per ton shall be paid weekly upon receipt of the car-load weights as determined by the Railroad Company at Huntington, Oregon. The balance due shall be paid weekly upon receipt of the car-load weights as determined by the International Smelting Company of International, Utah, which weight is mutually recognized as the most accurate. The weights referred to herein are meant the net weights of the concentrates. All other materials to be paid for weekly at the above rate upon delivery at Oxbow. * *

"(9). This is mutually understood and agreed to be an exclusive contract from the Company to the Contractor for the hauling of said concentrates and return freight, subject to the performance of the agreement and covenants herein expressed.

"(10). The Contractor agrees to transport an average of fifty tons of concentrates per day, counting 26 working days to the month of thirty days, until the concentrates on hand at this date, estimated at 1200 tons, plus the concentrates which will be accumulating during this period, have been delivered f. o. b. cars at Oxbow; and, in event of the failure of the Contractor to maintain the said daily average of 50 tons, he shall pay the Company a forfeit of Fifty Cents (50c) per ton for each and every ton less than Thirteen Hundred (1300) tons delivered at Oxbow in said month of 30 days, barring delays caused by 'Acts of God' or unavoidable serious accidents.

"(11). After the aforesaid 1200 tons of concentrates on hand, plus the concentrates which will be accumulating, has been hauled at the said average of fifty tons per day, the Company agrees to furnish the Contractor a daily minimum average of not less than ten tons per day counting 26 working days to the month of 30 days, providing that the Company's Mill continues in operation and barring delays caused by 'Acts of God' or serious accidents, and further the Company agrees to furnish the Contractor a total of

not less than 1600 tons of concentrates to haul according to the terms herein specified including the aforesaid 1200 tons, and, failing to do so, the Company will pay the Contractor the sum of \$500.00 as reasonable reimbursements of his initial outlay and expense incurred in bringing in his equipment, etc. * *

“(13). It is further understood and agreed that, after the aforesaid 1600 tons of concentrates have been hauled from Homestead to Oxbow, the Contractor shall have the preference right to continue hauling said concentrates and return freight at the same rates per ton as specified in paragraphs No. 4 and No. 3 hereof as long as the Company shall have any hauling to be done.

“(14). The Contractor agrees to commence active preparations to carry out the terms of this contract immediately, and will either ship or drive his truck to Oxbow as quickly as suitable arrangements can be made, and he further agrees to commence hauling the concentrates at the said average of 50 tons per day within ten days from the date his equipment arrives.

“(15). Time and performance are the essence of this contract.”

The plaintiff, Johnson, entered into the performance of his contract and hauled about 4,300 tons of concentrates; but the company, becoming dissatisfied, rescinded the contract and refused to permit him to haul further. Thereafter Johnson brought action against the company. His complaint alleges four separate rights of action, each based upon an alleged breach of the contract. The first right of action undertakes to recover \$576.78, alleged to have been wrongfully withheld by the defendant as a forfeiture or liquidated damages. The second alleges a breach of the contract by the defendant in refusing to permit plaintiff to haul 400 tons of concentrates, asserted to have accumulated and to be on hand August 15, 1919,

the date plaintiff ceased to transport the company's concentrates, resulting in a loss to plaintiff of \$800. The jury found against the plaintiff on this asserted claim. The third alleges a violation of the contract by defendant's failing to produce, following June 9, 1919, a minimum production of ten tons of concentrates per day, causing plaintiff a loss of profit of \$2 per ton on 220 tons. This claim for damages was withdrawn by the plaintiff during the trial. The fourth alleges a breach of the contract by the defendant in refusing to permit the plaintiff to haul 4,225 tons of concentrates between August 15, 1919, and February 1, 1920, which resulted in an alleged loss of profit to plaintiff of \$2 per ton.

Pending the trial the complaint was amended and the tonnage in the last-mentioned claim for damages reduced to 3,865.69 tons. To this complaint the defendant filed a motion "to compel the plaintiff to elect upon which ground or cause he will proceed to trial, or, failing that relief, the defendant moved to strike the amended complaint from the files, upon the ground that the relief prayed for in the various causes of action was included in other causes of action set forth in the amended complaint, and that without such election duplicate recovery for the same cause of action could be recovered." A demurrer was also filed, alleging that the complaint failed to state facts sufficient to constitute a cause of action. Both were overruled. Thereupon the defendant answered, a trial of the issues was had, and a verdict was rendered by the jury, finding for the plaintiff on his "first cause of action in the sum of \$536," and on his "third, further, and separate cause of action in the sum of \$3,865.69." Judgment was thereafter entered in favor of plaintiff and against defendant for

\$4,401.69, with costs and disbursements taxed at \$134.40. From the judgment entered the defendant appeals to this court.

AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. John L. Rand*.

For respondent there was a brief with oral arguments by *Messrs. Nichols & Hallock*.

BROWN, J.—In defendant's abstract of record appear fifty-five assignments of error. In its brief it rests its cause upon seven propositions, which it vigorously maintains. The plaintiff alleged damage by reason of four asserted breaches by defendant of the contract between the parties, and stated his rights of action growing out of said breaches as separate causes in one complaint. The court having overruled the defendant's motion requiring the plaintiff to elect upon which of his alleged causes of action he would rely, it assigns the court's action as error.

1, 2. We are not convinced that the court committed error in denying defendant's motion. For the purpose of considering the motion, we assume the facts stated in the complaint to be true, and, after having carefully read that document, we are satisfied that there could not have been duplicate recovery for the same cause of action. Hence no grounds existed requiring an election, nor was there a valid reason for dismissing the complaint. It was said by Justice WOLVERTON, speaking for this court, that:

"The practice, however, of allowing or disallowing a motion of the kind is a matter largely within the sound discretion of the trial court: *Manders v. Craft*, 3 Colo. App. 236 (32 Pac. 836); *Carlton v. Pierce*, 1 Allen (Mass.), 26; *Hawley v. Wilkinson*, 18 Minn. 525 (Gil. 468); *Plummer v. Mold*, 22 Minn. 15; *Wagner v.*

Nagel, 33 Minn. 348 (23 N. W. 308); *Kerr v. Hays*, 35 N. Y. 331. *Harvey v. Southern Pac. Co.*, 46 Or. 505 (80 Pac. 1061)."

In a recent case discussing the law relating to the right of the defendant to compel the plaintiff to elect between two causes of action stated in the complaint, Justice BURNETT said:

"The canon laid down by the case last cited is in substance that to require an election it must be impossible for both causes of action simultaneously to be true": *Askay v. Maloney*, 92 Or. 566, 573 (179 Pac. 899, 902), citing *Hayden v. Pearce*, 33 Or. 91 (52 Pac. 1049); *High v. Southern Pac. Co.*, 49 Or. 98 (88 Pac. 961); *Harvey v. Southern Pac. Co.*, 46 Or. 505 (80 Pac. 1061); *Swank v. Moisan*, 85 Or. 662 (166 Pac. 962).

A general rule of pleading for the recovery of damages on account of breaching a contract is thus stated in 4 Enc. of Plead. & Prac. 941:

"Where it is sought to recover for several breaches of one entire contract, it may be stated, as a general rule, that all the breaches may be set out in one count or paragraph of the declaration or complaint: *Wilcox v. Cohn*, 5 Blatchf. (U. S.) 346 (Fed. Cas. No. 17,640); *Sheetz v. Longlois*, 69 Ind. 491; *Smiley v. Deweese*, 1 Ind. App. 211 (27 N. E. 505); *Richardson v. State*, 55 Ind. 381; *Fisk v. Tank*, 12 Wis. 276; *Chambers v. Robbins*, 28 Conn. 544; *Smith v. Boston etc. R. Co.*, 36 N. H. 459; *Legh v. Hewitt*, 4 East, 154; *Brown v. Stebbins*, 4 Hill (N. Y.), 154."

The rule under the Oregon Code, as announced by Justice DEADY, in the case of *Oh Chow v. Hallett*, 2 Sawy. 260 (Fed. Cas. No. 10,469), is as follows:

"The practice of assigning more than one breach in the same count or statement of a cause of action, prior to the Code, was permitted only in covenant upon a deed and by statute in debt upon bond with a condition, or to secure covenants. When an ordinary

contract contains various substantive and independent provisions—as in this case, to pay for labor furnished, and to furnish transportation to laborers—if there is a breach or failure to perform more than one of the stipulations, there are distinct causes of action, requiring different proofs, and which may admit of different defenses, and therefore should be stated separately. This cause of action, not being pleaded separately, is liable to be stricken out on motion: Or. L. 261.”

In *Toy William v. Hallett*, 2 Sawy. 261 (Fed. Cas. No. 14,123), Justice DEADY stated that different breaches of the same contract give rise to distinct causes of action. Justice BEAN, in speaking for this court in *Bade v. Hibberd*, 50 Or. 504 (93 Pac. 365), said:

“The causes of action mentioned in the complaint both arise out of contracts, and can be properly united in the same complaint. * * The objection that they are not separately stated should have been taken by motion at the proper time.”

Section 67, Or. L., provides that the complaint shall contain a plain and concise statement of the facts constituting the cause of action, without unnecessary repetition. Section 85, Or. L., states that in the construction of a pleading for the purpose of determining its effect, its allegations shall be liberally construed, with a view of substantial justice between the parties.

3. The language of the law is clear, concise, and manifest. While the writer believes that it would have been better pleading for the plaintiff to have stated his first further and separate cause with his third alleged cause in one count, his failure to do so is not a ground for reversing this case because of the denial of defendant's motion. The defendant suffered no prejudice by reason of the court's ruling.

"The court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party": Section 107, Or. L.

4. The court committed no error in overruling defendant's demurrer. The plaintiff's rights grew out of the alleged breaching of the contract by defendant. The plaintiff pleads the making of the contract, its terms, the consideration, performance by plaintiff, breach by defendant, and damages: *American Audit Co. v. Indus. Fed. of Am.*, 80 App. Div. 544 (80 N. Y. Supp. 788); *Wuchter v. Fitzgerald*, 83 Or. 673 (163 Pac. 819); *Easton v. Quackenbush*, 86 Or. 374, 377 (168 Pac. 631); *Burggraf v. Brocha*, 74 Or. 381 (145 Pac. 639); *Pac. Bridge Co. v. Oregon Hassam Co.*, 67 Or. 576 (134 Pac. 1184).

The proper construction of Section 11 of the contract is involved in this controversy. Under a certain condition therein specified, the company agrees to pay the contractor \$500. Now, what is that condition? Said section provides that "the company will pay the contractor the sum of \$500, as reasonable reimbursements of his initial outlay and expense incurred in bringing in his equipment," provided that it "fails to furnish the contractor less than 1,600 tons of concentrates to haul." This condition and provision of the contract is clear. It means just what it says and nothing more. The contractor never was entitled to claim that \$500, or any part thereof.

It is asserted by appellant that the court erroneously construed Section 13 of the contract, providing that—

"After the aforesaid 1,600 tons of concentrates have been hauled, * * the contractor shall have the preference right to continue hauling the said concentrates

* * so long as the company shall have any hauling to be done."

The testimony shows that plaintiff was afforded the right to elect, and did elect to haul after he had transported 1,600 tons, and continued to haul until he had delivered at Oxbow 4,300 tons of concentrates.

As the case is presented by the record, the court properly rejected instruction 19 requested by defendant, and rightly gave instructions 17 and 23, the latter reading:

"In his fourth cause of action, designated in the complaint as the third, further, and separate cause, plaintiff refers further to that provision of the contract which gave him a preference right or option to continue hauling after the 1600 tons had been hauled, on the same terms as provided in the contract, so long as defendant should have any hauling to be done; and he alleges that he exercised that option and elected to so continue. In this connection he further alleges that on August 15th, 1919, defendant wrongfully rescinded the contract, and thereafter prevented plaintiff from hauling, and that since that time defendant has produced not less than 4225 tons of concentrates, and he alleges that, had he not been so deprived and prevented from hauling, he would have hauled the same according to the terms of the contract, and that his costs and expenses of such hauling would not have exceeded \$2 per ton, and that by reason of being so prevented he therefore suffered damages in the sum of \$8,450.

"These allegations are denied by defendant, and the burden of proof is therefore upon plaintiff to establish by a preponderance of the evidence that he was willing, ready, and able to perform according to the terms of the contract, that defendant wrongfully prevented it, and that he was damaged by not being permitted to haul those concentrates at \$4 per ton in conformity with the contract."

5. The defendant forcefully argues the proposition that the contract is only a *nudum pactum*. It is true that a promise made by one party without a corresponding consideration, obligation or promise made by the other is void. In the case of *Corbitt v. Salem Gas Co.*, 6 Or. 405, 407 (25 Am. Rep. 541), Mr. Justice PRIM, speaking for this court, said:

"A promise made by one party is a good consideration for a promise made by the other party, but the promises must be concurrent and obligatory on both parties at the same time. A promise made by one party, as in this case, without a corresponding obligation or promise by the other, is void."

This case was cited with approval in *Lemler v. Bord*, 80 Or. 224, 227 (156 Pac. 427, 1034), and in *The Oregon Home Builders v. Crowley*, 87 Or. 517, 539 (170 Pac. 718, 171 Pac. 214). In *Livesley v. Johnston*, 45 Or. 30, 41 (76 Pac. 946, 948, 106 Am. St. Rep. 647, 65 L. R. A. 783), this court, speaking by Justice WOLVERTON, said:

"Where the agreement is wholly executory, it is essential that the obligations be mutual, else there is no consideration for its support, and it is but a mere *nudum pactum*."

To the same effect are the cases of *Rose v. Oliver*, 32 Or. 447 (52 Pac. 176); *Richardson v. Orth*, 40 Or. 252, 262 (66 Pac. 925, 69 Pac. 455), and *Webb v. Isensee*, 79 Or. 114, 120 (152 Pac. 800).

6, 7. The contract under consideration must be construed as a whole; every paragraph, every sentence, clause, phrase, and word must be considered in interpreting its meaning. The paragraph containing the option, therefore, is not to be construed as if it stood alone. There was some consideration for the option. Plaintiff purchased a motor truck, quit his employment, went to Homestead, and in storms and over bad

roads undertook to fulfill his contract by hauling the produce of defendant's mine from Homestead to Ox-bow. He was induced to undergo the hardships of hauling the concentrates on hand at the beginning by the defendant's promise to give him the right to do all its hauling so long as it had hauling to do. That was the incentive that moved the contractor to enter into the contract. He not only hauled the 1,600 tons, and exercised his preference right, but continued to haul until he had transported 4,300 tons, when the defendant rescinded the contract.

8, 9. Where the promise consists of the doing of an act by another, and the latter does the act, the contract is not void for want of mutuality: *The Oregon Home Builders v. Crowley*, 87 Or. 517 (170 Pac. 718, 171 Pac. 214); 6 R. C. L. 687, § 94. There was a consideration from plaintiff to defendant for the option. It is an elementary principle that the law will not enter into an inquiry as to the adequacy of a consideration. This rule is almost as old as the law of consideration itself. Therefore anything which fulfills the requirements of consideration will support a promise, whatever may be the comparative value of the consideration and of the thing promised: 1 Williston on Contracts, § 115.

10. Upon a breach of a contract, where loss of profit is the measure of damages relied upon, such probable profits must be established by proof of data from which the extent of the profit, if any, may be ascertained: *Hagestrom v. Sweeney*, 60 Or. 433, 436 (119 Pac. 725, citing 4 Ency. Ev. 5, 14, 21); 8 Am. & Eng. Ency. of Law (2 ed.), 621, 622, and note; *Douglas v. Ohio River R. R. Co.*, 51 W. Va. 523 (41 S. E. 911); *Ramsey v. Holmes Elec. Prot. Co.*, 85 Wis. 174

(55 N. W. 391); *Lentz v. Choteau*, 42 Pa. 435; *Durkee v. Mott*, 8 Barb. (N. Y.) 423.

We have read all the testimony in this case, and are satisfied that the record discloses an abundance of data from which the alleged profit could have been estimated.

11, 12. The defendant requested the court to instruct the jury to find for the defendant on the first cause of action alleged in the complaint, and because of the refusal of the court to give such instruction counsel alleges error. He also excepted to the instruction of the court defining the phrase "act of God," given to the jury, and likewise excepted to the instruction of the court advising the jury that—

"An unavoidable, serious accident means, in such a contract, any unusual, unexpected, and unintended occurrence, and not brought on by failure to exercise ordinary care and prudence, and of such character that the parties could not reasonably have contemplated the same at the time of the contract to take adequate precautions to prevent it by the exercise of ordinary diligence, prudence, and foresight, and which causes such interference and resulting delay as could not by such diligence, prudence, and foresight have been avoided."

The court approves that definition. The phrase "act of God," as explained to the jury by the court, was so favorable to the defendant that he is not in a position to complain. Under the court's instruction and the evidence, the jury could not have excused the plaintiff from nonperformance by reason of an act of God. However, there was some testimony tending to prove an unavoidable serious accident. The plaintiff's truck, while hauling a load of concentrates, for some unexplained reason, and without negligence upon the part of plaintiff or his agents, left the narrow grade of the roadbed and rolled hundreds of

feet down a steep embankment. The driver was very seriously injured and the truck damaged. That accident, according to the evidence, delayed the contractor in some measure at least, and was therefore a proper matter to be submitted to the jury as a question of fact. The jury found for the plaintiff, and that finding must stand.

13. Under the provisions of Article VII, Section 3, of the Constitution, this court has no right to re-examine a cause or fact tried by a jury, unless the court can affirmatively say there is no evidence to support the verdict: *Martini v. Oregon-Wash. R. & N. Co.*, 73 Or. 283 (144 Pac. 104); *Sullivan v. Wakefield*, 65 Or. 528 (133 Pac. 641); *Woods v. Wikstrom*, 65 Or. 581, 587 (135 Pac. 192); *Taggart v. Hunter*, 78 Or. 139 (150 Pac. 738, 152 Pac. 871, Ann. Cas. 1918A, 128).

The record disclosing no substantial error whereby defendant might have been prejudiced, this case is affirmed.

AFFIRMED.

Argued at Pendleton October 26, affirmed December 21, 1920.

FIRST NAT. BANK v. BACH.

(193 Pac. 1041.)

Trial—Jury Trial Waived Where Both Parties Moved for Directed Verdict.

1. Where each party moved for a directed verdict, the right to trial by jury was waived, and the question was submitted to the court as a matter of law whether verdict should be directed for plaintiff or defendant.

Pleading—Conclusions of Pleader cannot Vary Liability of One Executing Note.

2. Where a note with the addition of defendant's name on the back was set forth in the complaint, defendant's liability is fixed by

1. Effect of request of both parties for directed verdict, see notes in 6 Ann. Cas. 545; 13 Ann. Cas. 372; Ann. Cas. 1913C, 1342.

2. On character under uniform negotiable instruments law, of one who places his name on back of note prior to or at time of delivery, see notes in 14 L. R. A. (N. S.) 842, and L. R. A. 1916D, 223.

the instrument, which controls conclusions of the pleader as to liability.

Bills and Notes—One Placing His Name on the Back of a Note Held an Indorser.

3. Under Section 7855, Or. L., declaring that anyone placing his signature upon an instrument otherwise than as maker, drawer or acceptor is deemed an indorser unless he clearly indicates his intention to be bound in some other capacity, and in view of Section 7856, declaring that an individual not otherwise a party who places his signature on a note in blank before delivery is liable as an indorser, defendant, who placed his name on the back of a note without any notation indicating his intention to be otherwise bound, is liable only as an indorser.

Evidence—Words Varying Indorser's Liability must Appear on the Instrument Itself.

4. Under Sections 7855, 7856, Or. L., words varying the liability of one placing his name on the back of a negotiable instrument from that of a mere indorser must appear on the instrument itself as part of the indorsement, for not only is this so required by statute, but promissory notes being in a sense accepted as current money by merchants should carry a full statement of all of their conditions.

Bills and Notes—To Hold Indorser, Presentment must be Shown or Excused.

5. While Section 7872, Or. L., provides that presentment is not required in order to charge an indorser, where the instrument was made or accepted for his accommodation, and Section 7907 provides that notice of dishonor is not necessary in such case, in all other cases presentment for payment as provided for by Section 7863 and notice of dishonor in accordance with Section 7881 must be given to charge an indorser, or the failure excused.

Bills and Notes—Indorser Held not Person Accommodated, and so Presentment and Notice of Dishonor was Necessary—"Accommodation Party."

6. Where a debtor accepted drafts drawn by defendant, such drafts being discounted on defendant's indorsement, and on maturity of acceptances a note was given for the amount of the drafts which defendant indorsed for the accommodation of his debtor, the instrument was not given for defendant's accommodation, nor was he the party "accommodated," within Or. L., § 7821, defining an "accommodation party" as one who signs an instrument as maker, drawer, acceptor, or indorser, without receiving value therefor, and for the purpose of lending his money to another, the accommodation being to the debtor; hence, to hold defendant, it is essential to show presentment for payment and notice of dishonor.

4. Parol evidence as admissible to vary or explain the contract implied from the regular indorsement of a bill or note, see note in 4 L. R. A. 764.

From Union: JOHN W. KNOWLES, Judge.

In Banc.

After alleging its own corporate existence and that the defendants Bach and Robinson constituted a partnership styled "Summerville Lumber Company," the plaintiff avers in its complaint:

"That the plaintiff paid to the defendant J. D. Casey the sum of one thousand dollars upon two drafts of five hundred dollars each, drawn by him and accepted by defendant Summerville Lumber Company, in consideration of which all of the above-named defendants made, executed, and delivered to the plaintiff their promissory note in writing, of which the following is a copy:

"\$1,000.00

Elgin, Oregon, July 1, 1912.

"Ninety days after date, without grace, I, we, or either of us, promise to pay to the order of The First National Bank of Elgin, Oregon, one thousand and 00-100 dollars for value received, with interest after maturity until paid, at the rate of eight per cent per annum. Principal and interest to be paid in United States gold coin at The First National Bank of Elgin; and in case suit or action is instituted to collect this note, or any portion thereof, I promise to pay such an additional sum as the court may adjudge reasonable attorneys' fees in said suit or action.

"SUMMERVILLE LUMBER Co.

"By P. S. ROBINSON.

"P. S. ROBINSON.

"W. B. BACH.

"J. D. CASEY.

"No. 5946

"Due Oct. 1-12.

"That although the names of defendants P. S. Robinson, W. B. Bach, and J. D. Casey appear on the back of said note, it was so signed when issued and before delivery to plaintiff."

Further stating that no part of the note has been paid except specified interest, that the plaintiff is the

holder of the note, and that a certain sum is a reasonable attorneys' fee, the plaintiff demands judgment.

The answer of the defendant Casey, who alone appeared, denies every allegation of the complaint except the incorporation of the plaintiff, its location, and the copartnership of Bach and Robinson, and except as further stated. In the view here taken of the case, it is not necessary to consider the new matter of the answer, which was challenged by the reply.

A motion for nonsuit made by the defendant Casey at the close of plaintiff's case was denied, and, after all of the evidence was in, both parties moved the court for a directed verdict. The court denied both motions and submitted the case to the jury, which found a verdict for the defendant. From the resultant judgment the plaintiff appeals.

AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. L. Denham*.

For respondent there was a brief over the names of *Messrs. Cochran & Eberhard* and *Mr. Charles H. Finn*, with oral arguments by *Mr. George T. Cochran* and *Mr. Colon R. Eberhard*.

BURNETT, J.—1. Both parties waived trial by jury by moving for a directed verdict. They thus submitted to the court whether as a matter of law a verdict should be directed for the plaintiff or for the defendant. Under such circumstances, the court should have decided the question: *Patty v. Salem Flouring Mills Co.*, 53 Or. 350, 357 (96 Pac. 1106, 98 Pac. 521, 100 Pac. 298). In the instant case this

matter of practice is of small importance, for in our opinion the judgment rendered was the proper result.

2-4. We glean from the record that the trial court submitted the case to the jury under the direction that, if the name of Casey was indorsed on the note prior to its delivery to the bank, he should be held liable for the full amount of the note, but if that indorsement was placed on the note after its delivery to the bank, he could not be held. The essence of the averment concerning the note is that the defendants executed the instrument by the signature of the partnership as maker under the name of "Summer-ville Lumber Company," and that the names of the other defendants appeared on the back before delivery to the plaintiff. The plaintiff relies greatly upon certain language used by Mr. Justice MOORE in *Lumbermen's Nat. Bank v. Campbell*, 61 Or. 123 (121 Pac. 427), to the effect that where anyone writes his name on the back of a note at the time it is issued, for the purpose of procuring credit for the maker, or if the one so signing receives a part of the proceeds for which the obligation is given, he is an original maker. A careful study of that case discloses that the opinion in that part of it was discussing the law as it existed prior to the enactment of our negotiable instruments law, codified in Chapter IV, Title LXIII, Or. L. That this is the proper construction of the opinion is plain from the quotations later made in the deliverance of Mr. Justice MOORE, setting out excerpts from the Negotiable Instruments Act and holding in effect that the mention of requirements of the act excludes the operation of all other conditions, with the result that that legislation constitutes the sole and exclusive standard by which questions relating to negotiable paper must be adjudicated.

It is said in Section 7855, Or. L., that anyone placing his signature upon an instrument otherwise than as maker, drawer or acceptor is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity. In Section 7856 we learn that, where an individual not otherwise a party to the instrument places thereon his signature in blank before delivery, he is liable as an indorser. Section 7858 prescribes the obligation of the indorser who indorses without qualification. Among other things, he engages that on due presentment of the instrument it shall be accepted or paid or both, as the case may be, according to its tenor, and that, if it be dishonored and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder or to any subsequent indorser who may be compelled to pay. The time when the instrument must be presented is prescribed in Section 7863, to the effect that, if it is not payable on demand, it must be paid on the day it falls due. We learn in Section 7875 that

“The instrument is dishonored by nonpayment when (1) it is duly presented for payment but payment is refused or cannot be obtained or (2) presentment is excused and the instrument is overdue and unpaid.”

Again, according to Section 7881—

“Except as herein otherwise provided, when a negotiable instrument has been dishonored by non-acceptance or nonpayment, notice of dishonor must be given to the drawer and to each indorser, and any drawer or indorser to whom such notice is not given is discharged.”

It thus appears that the rule is that notice of dishonor must be given to an indorser, if he is to be held for payment of the amount due upon the instrument. The exception to the rule is found in two sections of the statute:

"Presentment for payment is not required in order to charge an indorser, where the instrument was made or accepted for his accommodation, and he has no reason to expect that the instrument will be paid if presented": Section 7872.

"Notice of dishonor is not required to be given to an indorser in either of the following cases: * * (3) where the instrument was made or accepted for his accommodation": Section 7907.

Section 7821 reads thus:

"An accommodation party is one who has signed the instrument as maker, drawer, acceptor, or indorser, without receiving value therefor, and for the purpose of lending his name to some other person. Such a person is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party."

The consequence of this definition is the abolition of all previous decisions to the effect that, if the holder knew a party had signed for accommodation only, he must be treated as a surety, so that indulgence to the real debtor would in some instances discharge the accommodation party. The law now is, as laid down in this section, that an accommodation party can claim no benefit as such, but he is liable according to the face of his undertaking, the same as if he were himself financially interested in the transaction.

It is said in the complaint that the plaintiff paid to Casey \$1,000 upon two drafts, which transaction

formed the consideration for all of the defendants making the note in controversy. The effort of the pleader in stating that the defendants made, executed and delivered the promissory note is to hold Casey as a maker and so not entitled to notice of dishonor. But this legal conclusion which the plaintiff essays to fasten upon the instrument is controlled by the instrument itself quoted in the complaint, and the subsequent allegation of the complaint to the effect that the name of Casey appeared on the back of the note: *Somers v. Hanson*, 78 Or. 429 (153 Pac. 43); *Cranston v. California Ins. Co.*, 94 Or. 369 (185 Pac. 292). Under Section 7855, Or. L., Casey was clearly an indorser, for his name appears in blank on the back of the note and there are no words whatever indicating his intention to be bound in any other capacity than as such indorser. In *Overland Auto Co. v. Winter* (Mo. App.), 180 S. W. 561, later affirmed in 277 Mo. 425 (210 S. W. 1), it is held that the words varying the indorser's liability must appear upon the instrument itself as part of the indorsement which he signs. The reason of this is manifest. Promissory notes or bills of exchange are in a certain sense "current money among the merchants," and the convenience of business is best subserved by their carrying the full statement of their terms and conditions with them, so that by inspection of the paper all of the relations of the parties may be determined. This principle is codified in section 7855, to the effect that a name alone on the back of a note makes the writer an indorser.

5. It is a principle well settled that, in an action against an indorser, the complaint must show presentment of the instrument and demand of payment from the maker, and prompt notice thereof to the

indorser, or disclose an excuse for not doing so bringing the pleader within the statutory exceptions. In this instance, the complaint does not attempt to comply with either the rule or the exception. No pretense is made of presentment to the Summerville Lumber Company or demand of payment, or of any notice of dishonor given to Casey as indorser, in time or out of time. The mere fact that the money was paid to Casey on the acceptances mentioned in the complaint does not show that the instrument was made or accepted for his accommodation.

6. We have seen in Section 7821 the signification of an accommodation party. Inferentially at least, we draw from the same section the meaning of the accommodated party or one for whose accommodation the instrument is made. An essential ingredient to be considered in determining who is the accommodated party is found in the element that he is the one to whom credit is loaned, and not the one who loans his credit. In *Noland v. Wilcox Motor Co.*, 137 Tenn. 667 (195 S. W. 581), this subject is discussed. Quoting from 8 C. J., page 855, Section 402, it is said there:

“An essential element of accommodation paper is that it must be loaned or signed by one party for the purpose of securing credit for another party generally or for a specific purpose.”

And after allusion to sundry sections of the negotiable instruments law of that state, identical in terms with ours, it is said, referring to an accommodation maker or indorser:

“Under this section it is held that persons putting their names on the back of a note before delivery for the accommodation of the maker are accommodation indorsers: *Deahy v. Choquet*, 28 R. I. 338 (67 Atl.

421, 14 L. R. A. (N. S.) 847). The party accommodated need not be a party to the note, and such accommodation may originate in the suggestion or request of a third person."

In the instant case the evidence in the bill of exceptions shows that this transaction originated as between Summerville Lumber Company and Casey in a debt owing by the firm to the latter, for which he had drawn upon the concern, and it had accepted his drafts. Thereupon the bank discounted them on his indorsement in blank. When the acceptances matured, the note in question was given to take them up and they were returned to Casey. In no respect was credit loaned to Casey. On the other hand, he loaned his credit to the partners. They were the parties who could not pay, needed help, and borrowed Casey's name and credit. Consequently, the instrument was not made or accepted for his accommodation. The ruling principle of accommodating and being accommodated, as used in the Negotiable Instruments Act, is found in the loan of credit to another. The one who loans is the accommodator. The one who receives the loan of credit is the party accommodated. In a sense, it was a favor or accommodation to Casey to collect the money on the debt owing to him by the partners. In another sense, it was an accommodation to the bank to have Casey's name with the others on the note and thus increase its discounts of commercial paper, with its increment of interest. But in the strict legal sense, the only party for whose accommodation the instrument was made was the firm, Summerville Lumber Company. To it alone did Casey loan his credit.

The result is that there is no showing by way of pleading that Casey was anything else than an indorser. Further, it does not appear that he was either notified of any presentation to or demand upon the principal debtor for payment or that there was any excuse for not doing so. Neither does it appear in the evidence as reported that the instrument was made or accepted for Casey's accommodation, so as to excuse the holder from making presentment and giving notice of dishonor.

In *Murray v. Third Nat. Bank*, 234 Fed. 481 (148 C. C. A. 247), commenting upon the statute corresponding to our Section 7872, dispensing with presentment for payment and notice thereof where the instrument was made or accepted for the accommodation of the indorser, the court used this language:

The section applies "only to cases where the indorser is the primary debtor, the reason for the rule being that no one is bound to indemnify the primary debtor, and he is thus no more entitled to presentment, demand, or notice than if his true character had appeared on the paper."

In *Overland Auto Co. v. Winter* (Mo. App.), 180 S. W. 561, it appeared that Winter and Strang together bought an automobile from the plaintiff and in payment for the same issued a note due ninety days after date, signed "C. F. Winter" and indorsed on the back "W. B. Strang." The court held there that parol evidence could not be admitted to change the legal effect of the note and indorsement sued upon; that pleading an instrument according to its legal effect is controlled by the document itself copied into the pleading; and that the mere fact that the indorser became part owner of the automobile for which the note was given does not

dispense with the notice due him on nonpayment because the parties chose to contract with him solely as an indorser. In other words, as a memorial of their transaction the parties resorted to a negotiable instrument signed by one of the debtors and indorsed by the other, with the result that parol evidence could not be admitted to contradict or vary the legal effect of the writing thus adopted by all concerned.

In *Geller etc. Hardware Co. v. Drozda* (Mo. App.), 217 S. W. 557, the defendant had a vacant store building which he desired to rent. The plaintiff induced Gremer to lease the store, and sold him a stock of hardware on credit, which was installed in that store. The defendant indorsed Gremer's note given to the plaintiff for merchandise. It was there held that inasmuch as no credit was loaned to Drozda, but rather that it was loaned by him to the maker of the note, Drozda was a mere indorser, entitled to presentment, demand and notice of dishonor. The court fortifies its construction of the statute corresponding to our Sections 7872 and 7909 covering cases where the instrument was made for the accommodation of the indorser by this excerpt from the opinion of the supreme court of Missouri in *Overland Auto Co. v. Winter* (Mo. App.), 180 S. W. 561:

"The evidence offered by the plaintiff shows that the defendant was not in that sense an accommodated party; he was not one for whom anybody gratuitously executed the note. He was accommodated in the sense that he was benefited by the transaction, but he was not accommodated in the sense that there was a lending of credit to him. He was an ordinary indorser and therefore entitled to notice of dishonor before he could be held, and no notice was given."

In *Morris County Brick Co. v. Austin*, 79 N. J. Law, 1273 (75 Atl. 550), Austin as broker had effected a sale of bricks for the plaintiff and was anxious to receive his commission. The plaintiff refused to pay the commission unless Austin would indorse the note of the party to whom the bricks were sold. He did indorse the note, and received his commission from the plaintiff. Commenting upon this feature in connection with the statute, the court said:

“Austin did not receive value in any sense. What he received was the payment, out of the discounted note, of the commission due him. That was only the payment of a prior debt, not the giving of value for Austin’s indorsement.”

The conclusion is, then, that Casey was liable only as an indorser, for want of words appearing upon the instrument imposing upon him a different liability; that both in the pleading and in the evidence there is an utter absence of any showing that demand was made upon the principal firm for payment and notice given to Casey, or that the latter was in such a situation as a party accommodated as to dispense with such notice of dishonor.

Both as a matter of pleading and of evidence the judgment was right in its result and must be affirmed.

AFFIRMED.

Argued at Pendleton October 27, affirmed December 21, 1920.

CLERIN v. ECCLES.

(193 Pac. 1045.)

Contracts—Complaint must Show Performance or Waiver of Conditions.

1. A party seeking to recover on a contract must show in his complaint either that he has performed all of the conditions on his part to be performed or that performance has been waived by the defendant.

Corporations—Strict Compliance With Contract of Sale of Stock Waived by Buyer so That One of the Sellers was Entitled to Maintain Separate Action.

2. Where plaintiff and his associates agreed to sell to defendants their shares of the stock of a corporation, the agreement to be evidenced by the joint and several notes of one of the defendants payable to plaintiff and his associates as their interest appeared, the contract, which required a sale by all of the plaintiffs, is joint and several between the parties on either side, but where, on plaintiff's transfer of his stock, defendants accepted it and gave a note, plaintiff's associates, though ready and willing, not yet having transferred their stock, strict compliance with the contract was waived by defendants, and plaintiff may maintain in his own name an action on the note given him without joining his former fellow stockholders.

Corporations—Buyer of Stock Held Entitled Either to Rescind or Counterclaim for Damages.

3. Where plaintiff and his several associates agreed to sell to defendants all of their holdings in the stock of a corporation, and plaintiff's associates failed to transfer their shares, defendants, notwithstanding plaintiff's performance, may rescind the contract, being joint, or they may, when sued for the purchase price, counterclaim for damages for breach of the conditions as to the joint sale.

Corporations—Pledge of Corporate Stock Does not Deprive Pledgor of All Property Rights.

4. The pledge of corporate stock does not deprive the pledgor of all of his property rights therein.

Corporations—Notice of Rescission of Contract to Purchase Corporate Stock Necessary, Though Stock Pledged With Seller to Secure Purchase-money Note.

5. Where plaintiff and his associates agreed to sell defendants their holdings in the stock of a corporation, and plaintiff delivered his stock, receiving a note for the purchase price, the stock being pledged with him to secure payment, notice of rescission on account of the failure of his associates to perform is necessary; the general rule being applicable, despite defendants' contention that notice is not necessary where the consideration has wholly failed, for the

pledge of the stock to secure the note did not deprive defendants of all property rights therein.

Corporations—Recaption of Stock Held not Exclusive Remedy of Seller.

6. Where plaintiff and his associates agreed to sell their holdings of corporate stock to defendants, and plaintiff made delivery, receiving a note for the purchase price, a provision of the contract permitting the sellers to declare a breach of the contract and resume ownership of the stock on default in payment of the note did not make recaption of the stock, which was redelivered to plaintiff as a pledge to secure payment of the note, his exclusive remedy.

From Baker: GUSTAV ANDERSON, Judge.

In Banc.

On November 12, 1907, as stated in the complaint, the plaintiff and his associates, stockholders of the Fir Lumber Manufacturing Company, a corporation, contracted jointly and severally to sell their several holdings of stock in that concern to W. H. Eccles, R. S. Eccles and W. H. Cheesman. At the time, as stated in the contract, the plaintiff and his associates held as follows:

Clerin	120 shares
Finn	30 "
Hostetler	63 "
McGregor	102 "
Newman	35 "
Kalvelage	150 "

Total.....500 shares.

The purchase price agreed upon was \$70 per share for the respective holdings of Clerin and associates. The defendants, to whom allusion will be made for convenience as "Eccles," contracted to take the stock and pay for the same in one year, the agreement to pay to be evidenced by the joint and several promissory notes of Eccles, payable to Clerin and associates as their respective interests appeared.

The stock of each, after having been transferred to Eccles, was to be pledged to the seller as collateral security for the payment of the note given to that seller. Included in the contract was an agreement that a certain logging contract held by Clerin, Hostetler, and McGregor with Davis and McRae was to be transferred to the Fir Lumber Manufacturing Company. Another condition of the contract reads thus:

"It is expressly understood and agreed that, in the event of the failure of the parties of the second part to consummate this agreement on their part by the delivery of the notes as herein provided, any and all additions or betterments made upon the premises of the Fir Lumber Manufacturing Company by said second parties during the life of this agreement shall be and become the property of the said company in lieu of liquidated damages and accruing to the first parties by reason of such failure of the second parties to perform; but if this agreement is not consummated by reason of the fault of the first parties, then all additions and betterments placed upon said premises by said second parties during the life of this agreement may be removed by them.

"It is further expressly agreed that in case of the failure of the parties to consummate this agreement, or in case of the failure of the second parties to pay the notes herein mentioned promptly when due, the parties of the first part may at once declare a breach of this agreement and resume the ownership of the corporate stock herein contracted for, and take possession of all of said corporate property, and the parties of the second part agree to deliver up the same peaceably."

It is averred, in substance, in the complaint that the plaintiff performed the contract on his part to be performed and that his associates each offered to perform in the same manner and were ready, able

and willing to perform, but that the defendants refused to accept some of the stock as required by the contract, and that the failure of the plaintiff fully to perform the covenants was due to the refusal of the defendants to accept the stock of some of his associates. It is averred also by the plaintiff that the defendants took his stock and executed and delivered to him their note for \$8,400 in accordance with the terms of the contract; that the same has not been paid, and that he is the owner and holder of it; wherefore he demands judgment for the amount of the note, and attorney's fees, less certain interest on the note which the defendants had paid. The making of the note and contract is admitted, except that there is an unimportant difference in the contract as set out in the complaint and as narrated in the answer. But, as stated in the brief of the defendants, that variance between the two copies is not of any moment in the present issue.

It is unquestioned that W. H. Eccles died before the commencement of this action; that R. S. Eccles was appointed his administrator; that the plaintiff presented his claim to the administrator in due form; that the same was rejected; and that six months from the rejection of the same have elapsed before the commencement of this action. After sundry denials of allegations of the complaint, the defendants set up affirmatively the organization of the Fir Lumber Manufacturing Company, the issue of 500 shares of its stock, held, as stated in the contract, by the plaintiff and his associates, and set out the contract as stated in the complaint, except as to the unimportant difference already mentioned. The defendants avow the making, execution and delivery to the plaintiff of the note sued on in the complaint

and the pledge of the stock formerly owned by him as collateral security for its payment. They charge a breach of the contract on the part of the plaintiff and his associates in that they did not transfer all of the 500 shares of stock. The culmination of their first separate defense is an averment in these terms:

“That on account of the failure and refusal by plaintiff and his said co-contractors to sell to the defendant, the deceased, and said Cheesman all of the 500 shares of stock in said corporation agreed to be sold as aforesaid, and because of the inability on account thereof of this defendant, the deceased, and said Cheesman to obtain control of said corporation and the management of its business and the conduct of its affairs, the defendant, the deceased, and said Cheesman renounced said contract and refused to be further bound thereby, and thereupon and in accordance with the terms and provisions of said contract the plaintiff and his said co-contractors resumed the control of the corporate property, as well as the ownership of the stock by them agreed to be sold as aforesaid and for the payment of which the promissory note mentioned in the complaint, as well as the other notes hereinabove mentioned, were given; and ever since said time the plaintiff and his said co-contractors have been and are the owners and holders of said stock and as such stockholders have been and are in control of the affairs, business, and assets of said Fir Lumber Manufacturing Company.”

Counting also on the matter thus stated they substantially allege that the consideration for the notes has wholly failed and the note sued on in the complaint “is and at all times has been without consideration.” A second defense is substantially that the provision of the contract already quoted, to the effect that in case of a breach the plaintiff and his

associates might take possession of the property, etc., constitutes an exclusive remedy by the contract.

The new matter in the answer is traversed by the reply and in that pleading avers, in substance, that at no time since the execution of the note and contract was it possible for the plaintiff and his associates to exercise their option to retake the property, because when the note became due Eccles was not the owner of the property and did not have any authority or control over it to enable him to transfer the same, so that the plaintiff did not attempt to take possession thereof. The jury trial resulted in a verdict and judgment for the plaintiff, and the defendants appeal.

AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. John L. Rand*.

For respondent there was a brief with oral arguments by *Messrs. Nichols & Hallock*.

BURNETT, J.—There are very many assignments of error, but substantially they are grounded upon the proposition urged by the defendants that the plaintiff is seeking to recover upon a contract which he has not performed on his part; further, that because the defendants pledged to the plaintiff as collateral for the security of the note, the stock they bought, they had received nothing from him, in consequence of which the consideration of the note wholly failed, giving rise to the corollary that it was not necessary for the defendants to give notice of the rescission of the contract.

1, 2. It is true as a principle of law that a party seeking to recover upon a contract must show in his complaint either that he has performed all of the

conditions on his part to be performed or that performance thereof has been waived by the defendant. The stipulations in the contract were joint and several as between the parties on either side; that is to say, Clerin promised jointly and severally with his co-contractors that he would transfer to the defendants all of the 500 shares of stock of the corporation. Consequently, he must show in his complaint either that he caused all of this to be done or that its full performance was waived by the defendants. The agreements of the parties of the first part and of the parties of the second part about the giving of the notes and the transfer of the stock to the defendants were mutual and concurrent covenants. In other words, the defendants were not bound to issue any note to any of the other contracting parties until all of the 500 shares of stock were tendered to the former. The allegation in the complaint to the effect that the plaintiff transferred and the defendants accepted his stock, that the latter gave and plaintiff accepted their note sued upon, that plaintiff's associates were ready, able and willing to transfer their stock, and that the defendants refused to take over the same, is a sufficient statement from which the conclusion may be drawn that the defendants, at least as to the plaintiff, waived strict performance of the contract on his part as a condition precedent to his maintenance of this action on their note.

The defendants chose to deal with the plaintiff separately and put him in a position where he could sue alone. If all of the stock had been delivered to the defendants and they had given to each of the former stockholders their note in compliance with the contract, no one would claim that all holders of defendants' notes must join in a single action on all

of the notes. Under such circumstances each holder would be entitled to bring action on his own note, in his own name, without joining his former fellow stockholders. *Pro tanto*, this is the situation in which the defendants have placed the plaintiff; so that, taken altogether, the complaint states facts sufficient to constitute a cause of action, as in a case where the plaintiff has pleaded part performance of the contract on his part and waiver by the defendants of strict performance of the remaining covenants. This is sufficient to put the defendants upon their defense.

3. Granting that the plaintiff's co-contractors were remiss in their duty, if the defendants would escape liability upon their contract or upon their note which is part of that contract, they had then the choice of two remedies. Providing they acted promptly on discovery of the breach of the covenant, whether by plaintiff, who is jointly and severally bound thereon, or by his co-contractors, the defendants could rescind the contract, but in doing so they would have to give notice thereof to the plaintiff and return all of the property they had received as part performance of the agreement on the part of the plaintiff. On the other hand, in the absence of a rescission as thus pointed out, the defendants could retain all they had received, and when sued for the purchase price could counterclaim against the note in damages they had suffered on account of the plaintiff's breach of the contract.

4, 5. The general rule is that it is of no effect to renounce the contract without giving notice thereof to the opposite party. The defendants seek to avoid the application of this principle by citations to the effect that where they have received nothing by

virtue of the contract notice of rescission is not necessary; further, that where a consideration for a note has wholly failed, it will be a complete defense to the note as between the original parties thereto; and, still further, that a partial failure of consideration may be urged as a defense against the note *pro tanto*. As showing that they received nothing under the contract, the defendants point out in argument that although the stock held by the plaintiff was transferred to them, yet they immediately pledged it to him as collateral in support of their note, and hence they urge the conclusion that they received nothing from the plaintiff by virtue of the contract. The argument is fallacious, however, for it has been held many times that a mere pledge of stock does not deprive the pledgor of his property therein: *State ex rel. v. Smith*, 15 Or. 98 (14 Pac. 814, 15 Pac. 137, 386); 19 Am. & Eng. Corp. Cas. 496; *Irving Park Assn. v. Watson*, 41 Or. 95 (67 Pac. 945); 16 Am. & Eng. Corp. Cas. (N. S.) 320; *Cohen v. Big Stone Gap Iron Co.*, 111 Va. 468 (69 S. E. 359, Ann. Cas. 1912A, 203, and note). The conclusion is plain, therefore, that the defendants did receive something as part performance of the contract and that there has not been a total failure of consideration for the note so as to dispense with notice of rescission of the contract of which the note may be conceded to be a part as between the immediate parties thereto. On the hypothesis, also, that the restoration of the property as upon rescission is well pleaded, proof thereof is not found in the fact that the purchased stock was pledged to the seller as collateral, for, as we have seen, the pledgor still has property in the pledge. This being true, the defend-

ants have yet some property which they have not returned so as to accomplish rescission or to establish entire failure of consideration, obviating the necessity of giving notice of their renunciation of the contract. As to notice of rescission, the principle is thus stated:

“If a party means to rescind a contract because of the failure of the other party to perform it, he should give a clear notice of his intention to do so, unless the contract itself dispenses with such notice, or unless notice becomes unnecessary by reason of the conduct of the parties”: 13 C. J. 619; *Hennesy v. Bacon*, 137 U. S. 78 (34 L. Ed. 605, 11 Sup. Ct. Rep. 17); *St. Regis Paper Co. v. Santa Clara Lumber Co.*, 186 N. Y. 89 (78 N. E. 701).

The answer is utterly silent about notice, or any excuse dispensing with it, within the meaning of the rule thus laid down. The answer is defective as a plea of rescission.

The defendants do not pretend to count upon damages as a counterclaim against the note. Failing in pleading rescission, if they would recover damages, they must allege the breaches of the contract by the plaintiff upon which they rely. The effort of the answer is to show that the plaintiff and his associates accepted the renunciation of the contract by Eccles and took possession of the property. This was denied by the plaintiff, and the jury by its verdict has found that his position is correct.

6. In brief, the plaintiff has substantially pleaded a case showing that he has partly performed his contract and that further performance, on his part at least, was waived by the defendants in contracting with him individually. The defendants have not shown by their answer that they took advantage of their right to rescind the contract, in that they fail

to aver notice thereof. They have not assigned in their answer any breach of the contract by the plaintiff not included in their waiver, as a legal conclusion to be drawn from the allegations of the complaint. Neither have they counterclaimed against the note in damages. Having placed the plaintiff in a position to sue them as an individual without reference to the shortcomings of his co-contractors, the most they could have done was to counterclaim against him for damages. They have not done this. The provision of the contract that either party should have the right to reassume possession on failure of the other party to perform is evidently collateral to the principal undertaking, which on the part of the defendants, as the pleadings disclose, is to pay a certain sum of money absolutely and at all events. Recapture of the property was a permissible but not an exclusive remedy for the plaintiff.

The judgment was right, and must be affirmed.

AFFIRMED.

Argued November 23, reversed and remanded December 23, 1920.

HOSTETLER v. ECCLES.

(194 Pac. 166.)

Landlord and Tenant—Tenant cannot Harvest Crops Sown Which cannot Mature Before Fixed Termination of Lease.

1. When the termination of a farm lease is specified to occur at a certain date, the tenant who sows a crop which cannot mature and be harvested before the termination of the lease plants at his peril, notwithstanding Section 2546, Or. L.

Landlord and Tenant—Lessee Entitled to Harvest Crop Sown Prior to Uncertain Termination of Lease.

2. Where farm lease provided for termination of lease on lessor's sale of the property prior to expiration of the specified

1. Right of tenant, under lease for fixed period, to crops after termination of lease, see note in 9 Ann. Cas. 1139.

term, lessee, having planted crop, had the right under Section 2546, Or. L., to enter upon the land and gather the crop, since in such case the termination of the lease depended on an uncertain event.

Judgment—Judgment Against Tenant in Forcible Entry and Detainer Precludes Recovery in Subsequent Action for Seed and Work in Planting Crops.

3. Where lessee under farm lease providing for termination of lease prior to expiration of specified term on lessor's conveyance of the premises planted crop prior to termination of lease effected by such conveyance, and was thereafter ousted from possession by judgment in forcible entry and detainer action prior to harvesting of crop, such judgment would be conclusive in lessee's action to recover the value of the seed and labor in planting crops if lessee's right to enter on land and harvest the crops sown could have been set up as a defense in the forcible entry and detainer action, since one cannot be cast in damages or suffer on account of a judgment regularly rendered in his favor.

Landlord and Tenant—No recovery for Crops Planted Prior to Termination of Lease Without Allegation That Owner Prevented Harvest Thereof.

4. Where lessee subsequent to termination of lease was entitled under Section 2546, Or. L., to enter on land and gather crops planted prior to termination, he could not recover from owner the value of seed and work in planting crops without alleging that owner prevented him from harvesting crop so planted.

Landlord and Tenant—Value of Seed and Labor Held not Recoverable on Termination of Lease Without Showing Arbitration of Amount.

5. Where farm lease provided for termination of lease prior to expiration of term on lessor's conveyance of land on demand by purchaser, and provided that on demand before certain date lessee should recover for labor and seed in planting crops prior thereto, the amount to be determined by arbitration, lessee could not recover for labor and seed in planting crops prior to a demand subsequent to such date, on theory that the value of the seed and labor is to be adjusted as if the demand had been made prior to such date, without showing an effort to comply with the provision as to arbitration.

Landlord and Tenant—Payment to Lessee for Termination Before Expiration of Term Held not to Preclude Harvest of Crops Previously Planted.

6. Where farm lease provided for termination on conveyance of land by lessor prior to expiration of specified term, on purchaser's demand for possession, and provided for cash payments to lessee on such termination of lease, such payment was a compensation for termination of term, and did not preclude lessee from entering on land and harvesting crops planted prior to termination under Section 2546, Or. L.

From Clackamas: JAMES U. CAMPBELL, Judge.

Department 1.

In substance, the complaint alleges that on April 24, 1915, the plaintiff leased some land from the Base Line Land Company, took possession, and remained in occupancy of the premises from that date until December, 1917. During the month of January, 1917, the lessor sold the property to the present defendant, also assigning and setting over unto him all of its interest in the lease.

It is then stated that about October 28, 1917, while the plaintiff was yet in possession of the premises, the defendant demanded possession and tendered \$200 in gold, requiring the relinquishment of the property on November 1, 1917. The plaintiff declined to deliver possession, and afterwards Eccles instituted an action of forcible entry and detainer against the present plaintiff, resulting in a judgment whereby the plaintiff was obliged to give up the possession of the premises and the whole thereof, which he actually did in December, 1917. Thus far there is no issue on the allegations of the complaint.

The plaintiff goes on to say that before the demand was made for the possession of the premises he had sown 30 acres of wheat and 7 acres of oats, and had done some work cultivating the meadow, laying out labor, materials and seed of the total reasonable value of \$516.70. Averring a demand that the defendant reimburse him for seed and labor, which the defendant refused to do, the plaintiff alleges that there is now due and owing from the defendant to him the sum of \$516.70, for which he demands judgment.

The lease in question, attached to and made a part of the complaint, contains the following provisions:

"It is further agreed that, in the event the aforesaid property is sold during the term of this lease and actual possession is required and demanded, the lessee herein will quit and deliver up the premises upon the following terms and conditions, to wit:

"If sale is made and possession is required prior to June 1st of any year during the term of this lease, the lessee shall be entitled to and shall receive payment for labor performed in planting crop and for seed planted, price for labor and seed to be adjusted by usual method of arbitration if an agreement cannot be reached otherwise.

"If sold and possession is required after June 1st and before November 1st of any year of the term of this lease, lessee shall be entitled to remain in possession until the November 1st following and to remove the crop. If lessee is allowed to remove crop, no payment is to be made him for seed or labor.

"In the event of sale as above set forth, lessee shall further receive a cash payment of \$400 if possession is required before November 1, 1915, \$300 if possession is required between November 1, 1915, and November 1, 1916, \$200 if possession is required between November 1, 1916, and November 1, 1917, on receipt of which said lease is to be surrendered and canceled, providing terms hereinbefore set forth have been carried out."

The defendant demurred generally to the complaint, but the same was overruled. In the view of the case we take, we deem it unnecessary to consider the answer or the reply, because practically they raise the same questions involved in the demurrer. Suffice it to say that judgment was entered for the plaintiff, and the defendant appeals.

REVERSED AND REMANDED.

For appellant there was a brief and an oral argument by *Mr. James P. Stapleton*.

For respondent there was a brief and an oral argument by *Mr. W. W. Dugan, Jr.*

BURNETT, J.—The lease involved was for the purpose of farming or agriculture, and it is said in Section 2546, Or. L.:

“When the leasing or occupancy is for the purpose of farming or agriculture, the tenant, or person in possession shall, after the termination of such lease or occupancy, have free access to the premises to cultivate and harvest, or gather any crop or produce of the soil planted or sown by him before the service of notice to quit.”

1, 2. We are not unmindful of the principle that, when the termination of a lease is specified to occur at a certain date, the tenant who sows a crop which cannot mature and be harvested before the termination of the lease, plants at his peril. This is not such a case. The termination of the lease involved is not one which would naturally occur by a mere lapse of the term. The ending of the lease as described in the complaint was uncertain, dependent upon whether or not the purchaser of the land should demand possession. The defendant here is concerned only about when demand is made for relinquishment, irrespective of when the sale was made. Of course, a sale must have been made before he could be required to surrender possession. In other words, so long as the property was owned by the original landlord, the lease could not be terminated except for a breach or rescission, until its natural expiration on November 1, 1918. But, given a sale, it is within the prerogative of the new landlord to demand possession at any time. By the terms of the lease, a demand of possession prior to June 1st of any year entitled the lessee to receive payment for labor per-

formed in planting the crop and for seed planted, etc., and this was to be determined by the usual method of arbitration if an adjustment could not be reached otherwise. That is the formula appropriate to a demand made prior to June 1st. Upon a demand made between then and November 1st the lessee is entitled to remain in possession until the first day of November next following—in this instance four days after the demand. But his rights do not utterly end at that time, if nothing else is shown. He is further entitled to remove the crop. This lease is affected by Section 2546, Or. L., *supra*, and the parties must be deemed to have contracted with reference to that statute. Hence, where the termination of the lease depends upon an uncertain event, as, for instance, a demand made at the discretion of the landlord, the tenant would have free access to the premises to cultivate and harvest the crop sown by him before the service of the notice to quit. That is this plaintiff's remedy in case of a demand made between June 1st and November 1st following.

3. But it appears from the complaint that the defendant here recovered a judgment against the present plaintiff in the forcible entry and detainer action ousting the latter from the possession of the property. If it were permissible in such an action for the defendant to aver the sowing of the crop prior to the service of the notice and the resultant statutory right of access to cultivate and harvest the same as a defense, at least *pro tanto*, against the action of forcible entry and detainer, it would seem that the judgment there entered would be conclusive against the plaintiff here. The present defendant cannot be cast in damages or suffer on account of a judgment regularly rendered in his favor.

4. It is not necessary, however, to place the decision wholly upon the theory that the forcible entry and detainer judgment has the effect to bar the present plaintiff in his effort to collect his claim for seed and labor. Much may depend upon the issues joined in that action, and it is possible that the defect of the present complaint in that respect may be obviated by amendment. As before stated, the plaintiff's remedy under the lease is the right to remove the crop as against a demand made between June 1st and November 1st following. As against a demand made for the possession between those dates the plaintiff's claim for compensation for crops sown is to be satisfied by his reaping that which he has sown, and not by a ratable payment of money as of a price. He must look to his remedy provided by the contract, a breach of which might give rise to an action for damages as for a tort. It is not averred in the complaint that the defendant in any way prevented the plaintiff from having access to the premises to cultivate and harvest the crop, and until this is shown he has stated no cause of action based upon the demand for possession which he avers.

5. Further, if the matter of labor and seed for the crop sown after June 1st and prior to the notice to quit is to be adjusted the same as upon a demand made before that date, it is requisite that the rights of the parties be determined by arbitration, as provided in that clause of the contract, or that some valid reason be adduced for not doing so. In a well-considered opinion in *Meyers v. Pacific Construction Co.*, 20 Or. 603 (27 Pac. 584), written by Mr. Justice LORD, it was held that:

"Where a contract provides that disputes or differences arising between the parties shall be sub-

mitted to some certain person for settlement, whose decision shall be final, it is incumbent upon the plaintiff, in an action upon such a contract, to allege and prove a compliance with that condition, or at least a reasonable effort to comply with it."

See, also, *Ball v. Doud*, 26 Or. 14 (37 Pac. 70).

In brief, if the judgment rendered against the present plaintiff in the forcible entry and detainer action concludes his rights under Section 2546, Or. L., he cannot maintain this action at all. If it is not conclusive as to his right to reap the away-going crop, his remedy as thus far disclosed was to avail himself of the statutory privilege of free access to the premises for the purpose of gathering the crop he had sown prior to service of the notice. It is not shown by the complaint that the defendant obstructed the plaintiff in the exercise of that right. And further, if the value of the seed and labor is to be adjusted as if the demand had been made prior to June 1st, it is requisite that the plaintiff show at least an effort to comply with the clause referring disputes to arbitrators.

6. Something is said in the argument to the effect that the admitted tender of \$200 foreclosed the claim of the plaintiff as stated in the complaint. In our judgment, the payments provided for in the quoted clause are independent of the question about labor and seed furnished or the removal of the crop. It will be observed that the cash payments mentioned are to be made solely with reference to the first day of November in any year and without any allusion to the date of June 1st. Let us take the twelvemonth between November 1, 1916, and November 1, 1917. It is plain that upon a demand for possession made, say in May, 1917, the tenant would be entitled to payment of a price for labor and seed laid out in plant-

ing the crop and to "receive further" a cash payment of \$200 specified for that period. A demand after June, 1917, would not affect the stipulated payment of \$200, or be affected by it. The only difference between the result of the two demands is that under the first the tenant receives a price for his labor and seed plus the payment of \$200, while under the second he has the right "to remove the crop" he has sown, plus, as before, the payment of \$200. This payment is a constant quantity in the problem of canceling the lease, while that relating to the crop is variable, dependent upon when the demand was made. If the defendant had called for the possession after June 1st and while the crop reaped in 1917 was still growing, or before the plaintiff had sown any seed for the next crop, \$200 would have satisfied the cash outlay required. But, having deferred his demand until a new crop was planted, the defendant was bound to allow the tenant access to the premises to cultivate and harvest that crop thus sown, unless the tenant is otherwise barred. It is clearly the intent of the parties and a fair construction of the lease to hold that the cash payments were intended as compensation for the surrender of the term, and that the away-going crop should be otherwise adjusted, on the basis of compensation for labor and seed, if the demand was made prior to June 1st of any calendar year, and of removing the crop if the demand was made after June 1st and before November 1st of the calendar year; in other words, the tenant was entitled to the appropriate payment absolutely and at all events, and the lease was to be surrendered and canceled, provided the preceding terms relating to the crop had been carried out. But, before the plaintiff can recover anything for the seed and labor laid out by him in his farming operations as against a demand

made between June 1st and November 1st, he must show some valid reason why he was wrongly denied the privilege of removing the crop.

The demurrer ought to have been sustained. The judgment is therefore reversed, and the cause remanded for further proceedings.

REVERSED AND REMANDED.

MCBRIDE, C. J., and BEAN and HARRIS, JJ., concur.

Argued at Pendleton October 26, affirmed December 21, 1920.

WILSON v. NORTH POWDER MILLING CO.

(194 Pac. 169.)

Principal and Agent—Burden of Proving Agency in Satisfaction of a Mortgage Held on Mortgagor.

1. In action to foreclose a chattel mortgage of crops, defended on ground that mortgage had been satisfied by mortgagor's conveyance of the land on which the crops had been grown to mortgagee by delivery of blank deed to mortgagee's alleged agent, who inserted mortgagee's name as grantee therein, mortgagor had burden of proving that alleged agent in accepting deed and inserting mortgagee's name therein was acting for and as agent of the mortgagee, or that his acts were ratified and approved by mortgagee.

Deeds—Principal and Agent—Evidence Held not to Prove Agency to Take Deed in Satisfaction of Mortgage, or That Deed was Ratified or Accepted.

2. In action to foreclose a crop mortgage, where mortgagor claimed that mortgage had been satisfied by conveyance to mortgagee, of land on which crops had been grown, evidence held not to prove that third person who received blank deed from mortgagor and inserted mortgagee's name therein was mortgagee's agent, or that mortgagee accepted, ratified or approved the deed.

In support of contention that no equitable assignment was effected by the agreement between the chattel mortgagor and the thresherman, see *Young v. Shockley*, 80 Kan. 78 (101 Pac. 631); *Boatman's Bank v. Fritslen*, 221 Fed. 145; *Krider v. Fannery*, 74 Ill. App. 237; *Eogers v. Sturgis*, 152 S. W. 1176; *First Nat. Bank v. Ballard*, 41 Okl. 553 (139 Pac. 293); *Crosby v. Fresno Fruitgrowers*, 30 Cal. App. 308 (158 Pac. 1070); *German-American Bank v. Seattle Grain Co.*, 89 Wash. 376 (154 Pac. 443).

Compromise and Settlement—Purchaser of Mortgaged Crops After Good Faith Settlement With Mortgagee Could not Refuse to Pay Agreed Amount Because of Unfiled Thresherman's Lien Claim Subsequently Presented to Purchaser.

3. Where purchaser of mortgaged crops made settlement in good faith with mortgagee as to amount due mortgagee and mailed mortgagee a check for the agreed amount, it could not thereafter recall check and refuse to pay such amount by reason of third person's claim for services in threshing the crop, for which no lien had been filed, as required by Section 10230 et seq., Or. L.

Chattel Mortgages—Sale of Crop by Mortgagor—Right to Proceed as Between Warehouseman and Mortgagee.

4. In a mortgagee's suit to foreclose a chattel mortgage, brought against mortgagor and purchasing warehouseman, to recover for mortgaged, growing crop, harvested and delivered to the warehouseman, and by him purchased, in the absence of an agreement on the part of the mortgagee, the chattel mortgage was a prior lien over the charges for sacking, hauling and shipping the grain.

Chattel Mortgages—Sale of Crop by Mortgagor—Rights of Mortgagee as Against Separate Agreement Between Mortgagor and Thresherman.

5. In a mortgagor's suit to foreclose a chattel mortgage, brought against mortgagor and purchasing warehouseman, to recover for mortgaged growing crops harvested by mortgagor and delivered by him through arrangement with another to the warehouseman, in the absence of agreement on the part of the mortgagee, an intervening thresherman could not be paid his threshing charges by the warehouseman, even though there was an agreement by the mortgagor—grower and the thresherman to the effect that the thresherman should have his money out of the sale of the grain.

From Union: JOHN W. KNOWLES, Judge.

In Banc.

On December 12, 1917, the plaintiff was the owner of 440 acres of land in Union County upon which there was then growing about 200 acres of fall grain which he had sown. On that date he sold the land with the growing crop to defendant John F. Arkell, for the agreed price of \$35,500. By the terms of the sale Arkell placed a first mortgage for \$18,000 on the real property, with a loan company, and paid this money to plaintiff, to whom he executed two promissory notes, each for the sum of \$8,750, payable in one and two years after date. Both of the notes were secured by a second mortgage on the land, the first

of which, payable one year after date, was further secured by a chattel mortgage upon the growing crop "described as all the grain sown and now growing and to be harvested, threshed and marketed during the season of 1918," upon "what is known as the Wilson place on Clover Creek, county of Union, State of Oregon." The mortgage was duly executed and acknowledged, and filed for record in the office of the county clerk on December 18, 1917.

No other grain was sown during the year, 1918. 2,831½ bushels of wheat were threshed from the crop, which was subject to the chattel mortgage and was delivered to the defendant North Powder Milling & Mercantile Company, and by it later sold for \$5,381.15. For its services and some incidental expenses the milling company made a charge of \$520.01, leaving net proceeds of \$4,861.14. After conference, plaintiff approved such charges and expenses, and agreed that they should be deducted from the gross amount, and the milling company mailed him a check for the balance. The defendant Laughlin was the owner of a machine, and threshed the grain at an agreed price of \$800. Although there was an agreement between Arkell and the milling company that Laughlin should be paid out of the proceeds of the grain, there is no evidence that the plaintiff was a party to that agreement, or that he ever approved it. During the time that the check was in transit in the mail from North Powder to La Grande, Laughlin saw the milling company and wanted his money, which it refused to pay, but it did countermand the mailed letter inclosing the check, and later refused to deliver the same to the plaintiff. The latter then brought the instant suit to foreclose his chattel mortgage, and to obtain a decree against the Arkells for

the full amount of the note with attorney's fees, and against the milling company for the amount of the mailed check, which, when received, should be applied *pro tanto* on the decree against the Arkells. Laughlin was made a defendant because of his claim for the threshing of the grain.

An answer was filed by Arkell and his wife, in which they admit the execution of the note and mortgage, and as a further and separate defense allege that on October 28, 1918, plaintiff employed H. T. Hill as his agent to procure the legal title from the Arkells to the 440 acres of land; that pursuant to such employment, and as agent of the plaintiff, Hill procured from Arkell an agreement in writing, giving him the exclusive right to sell the lands, for \$1,000, the purchaser to assume "all indebtedness against said land and crop." On October 29th, Hill notified the Arkells that he had found such purchaser, and on that day paid them \$500, and on the following day the further sum of \$500. The Arkells then executed a quitclaim deed to the premises, with the name of the grantee in blank. Later, Hill inserted the name of the plaintiff as such grantee, and filed the deed for record in the office of the county clerk on November 4, 1918. It is then alleged:

"That the said Henry T. Hill, in accepting delivery of said quitclaim deed to said 440 acres of land from said defendants, in inserting the name of the plaintiff as grantee therein, in filing the said deed for record, and in paying these defendants the said \$1,000, the purchase price therefor, was acting as the agent of the plaintiff duly authorized thereto," and that "these defendants thereby fully paid and satisfied said two promissory notes for the sum of \$8,750 each, including the promissory note set out and alleged in the complaint in this suit for part of the purchase price of said lands."

As a further and separate answer, they allege that Laughlin threshed the grain and had an agreement that he should be paid out of the proceeds of the sale. They pray for a decree that each of the notes should be surrendered and canceled; that the mortgages executed to secure those two notes should be satisfied of record; that Arkell is the owner of the balance of the money received from the sale of the grain and that he recover the further sum of \$900, as damages from the plaintiff.

In its answer the milling company alleges that there was a dispute as to who should have the money, and that it was a stakeholder and deposited \$4,739.54, in court, claiming it was entitled to deduct \$642.61 as its charges. In his answer, Laughlin pleads cutting and threshing the grain at an agreed price of \$800, and that he had an agreement with Arkell and the milling company that it was to be paid out of the sale of the grain, and he asks for a decree to that effect.

Plaintiff filed a reply to each further and separate answer, in which all the material allegations were denied. Testimony was taken, and the Circuit Court rendered a decree for plaintiff as prayed for in his complaint, including \$750 as attorney's fees, from which defendants appeal.

AFFIRMED.

For appellants there was a brief over the name of *Messrs. Crawford & Eakin*, with an oral argument by *Mr. Thomas H. Crawford*.

For respondent there was a brief over the name of *Messrs. Cochran & Eberhard*, with oral arguments by *Mr. George T. Cochran* and *Mr. Colon R. Eberhard*.

JOHNS, J.—1. The execution of the notes and mortgages being admitted, the important question here is whether, in obtaining the deed in blank from the Arkells and inserting the name of the plaintiff as grantee therein, Hill was acting for and as the agent of the plaintiff, and whether his acts were ratified and approved by plaintiff. The quitclaim deed executed October 29, 1918, recites that it conveys the premises "subject to all indebtedness against the land." It is claimed that the acceptance of the deed by Wilson operated to satisfy the Arkell mortgage and extinguish their debt. As to those questions, the burden of proof was upon the Arkells.

On October 28, 1918, Arkell, who then held the record title, gave to H. T. Hill a three-day option to purchase the land, on condition that "the purchaser assume all indebtedness against the land and crop," and that he should pay \$500 down and \$500 in ten days. Under this option Hill interested Rodger Ricks and Ezra W. Ricks, known as "Ricks Brothers," and they advanced the first \$500, later paying the other \$500. On October 29th, at the instance of Hill, Arkell and his wife for such consideration executed a quitclaim deed to the land, in which the name of the grantee was left blank. Hill testified as follows, regarding this feature:

"Q. Now what arrangement, if any, did you have with them in regard to inserting the name of the purchaser?

"A. I told Arkell at that time, that I didn't know how that deed was going to go, to both of these boys or one of them, and I didn't know their first names, and I didn't know just where the deed was going to go, and I wanted the deed made in blank, and fill it in afterwards.

"Q. And he assented to that?

"A. Yes. * *

"Q. Now, then, did you afterwards insert in the deed the name of the purchaser?

"A. Some time afterwards I inserted in the name, yes. I don't know just how long it was afterwards, some few days though. * * I put Mr. Wilson's name in the deed. * * I recorded it. * *

"Q. You still have the deed?

"A. I think I have. * *

"Q. And did you tell Mr. Wilson that you would put his name in the deed and put it on record?

"A. Well, I think some little time afterwards, I met Mr. Wilson on the street, and I told him I was afraid somebody might attach the land, and I had part of the boys' money, and for the protection of all of them, I put his name in the deed and filed it."

Later, Hill drew a contract between Ricks Brothers and the plaintiff, which was signed by the former, but never signed by the plaintiff. Concerning this agreement Hill testified:

"Yes; he said he didn't want to sign a contract until the matter was finally settled, and Arkell would give possession and everything, and he knew just exactly where he was, and I think he said there was some jangle in regard to the crop or something, and he didn't want to sign a contract until everything was settled, and he had perfect authority to sign one, and then he said he would have Cochran look over it or something like that, when he got ready."

After he inserted the name of Wilson as grantee in the deed, Hill took that instrument to the county clerk's office and filed it for record. After it was recorded it was returned to him. He further testified:

"Q. Now in those conversations, what, if any, arrangement or agreement was made between you and him, whereby you were employed by him to obtain from Arkell the legal title to this land?

"A. I don't know whether I was ever employed to secure that title for Wilson or not. Wilson said if

Arkell would get out of the road, and these young fellows were good workers, he would be willing to give them a chance. That was about the substance of the conversation."

2. It also appears that Arkell had some pressing creditors, and Hill became uneasy, thinking they might make trouble; that he deemed it advisable to put the property in the name of Wilson to facilitate the deal and avoid complications. It is apparent that it was the original intention of both Arkell and Hill that the deed should be made to Ricks Brothers; that they were the intending purchasers; that they furnished the \$1,000; that the only reason why the deed was not made out to them when it was executed was because Hill "didn't know their first names"; that it was for such reason Arkell assented to executing the deed with the name of the grantee in blank. In other words, at the time the deed was executed, it was the purpose of both Hill and Arkell that the land should be conveyed to Ricks Brothers, and it was to such a conveyance that Arkell gave his consent and authorized Hill to insert their names as grantees. Hill does not claim or testify that in the procuring and execution of the deed he was acting for the plaintiff. The record shows that at that time he was representing Ricks Brothers, and that he inserted plaintiff's name as grantee on his own motion, without the knowledge of either Arkell or the plaintiff. The plaintiff testifies fully and in detail that Hill was never his agent, and was never authorized to represent him; that the plaintiff had nothing to do with procuring the deed and never saw it; that he never authorized Hill to insert his name as grantee therein; that the first time he knew that this had been done was when Hill told him about it, after the deed had been filed for record; and that he never accepted, ap-

proved, or ratified that instrument. The testimony is conclusive that Hill was not at any time the plaintiff's agent, and that the latter's name was inserted in the deed without his consent; that he never accepted, ratified, or approved the deed.

3. It appears that after a conference between the plaintiff and the defendant milling company there was an agreement, in effect, "that the expenses connected with the sacking of said wheat and the making of said sale amounted to \$520.01," which should be deducted from the proceeds of the sale of the grain; and that the company should pay the plaintiff the balance of \$4,861.41. Pursuant to that agreement, the company prepared and mailed from North Powder a check for that amount to the plaintiff, and while the check was in transit Laughlin claimed his bill of \$800 for threshing the grain, as a result of which the milling company recalled the check. In other words, if Laughlin had not appeared and pressed his claim for payment when he did, the plaintiff would have received the check and the milling company would have paid him the full amount agreed upon in their mutual settlement.

4. The company now claims that the sacking, hauling and shipping charges totaled \$642.61, which amount should be deducted from the proceeds of the sale of the wheat. In the absence of an agreement on his part to pay, it might be questioned whether all of such charges would be a prior claim on the grain, as against plaintiff's chattel mortgage. Having made a settlement in good faith, the milling company should be bound by it, especially where it was acted upon by one party and relied upon by the other, and is fair and reasonable.

5. Sections 10,230 et seq., Or. L., provide for a thrasher's lien and that—

"The lien hereby created shall have priority over all other encumbrances or liens upon such grain, save and except only the lien of laborers for labor performed in heading, harvesting and threshing said crop."

There is no claim that any such lien was filed by Laughlin. At the time the grain was threshed the chattel mortgage was in full force and effect, and was a valid lien upon the grain. Although there was an agreement between Arkell and Laughlin to the effect that the latter should have his money out of the sale of the grain, there is no evidence that the plaintiff was ever a party to that agreement, or that he is bound by it.

The decree of the Circuit Court is affirmed.

AFFIRMED.

Argued at Pendleton October 25, affirmed December 7, 1920, rehearing denied January 4, 1921.

POPE v. MACDONALD.

(193 Pac. 831.)

Appeal and Error—Technical Objections Considered from Technical Standpoint.

1. Where objections urged on appeal are very technical and not of a character calculated, if applied, to promote justice, they are to be considered from a technical standpoint.

Appeal and Error—Pleading—Court Properly Permitted Filing of Reply on Trial.

2. Where plaintiff's attorney seasonably prepared a reply denying payment pleaded by defendant, and had it verified, but, not finding defendant's attorney in the city, put it by for future service and overlooked the matter until apprised of it by the opening statement of counsel at the trial, when he promptly asked leave to file it, court properly permitted it to be filed in view of Sections 102, 103, 107, Or. L.; the answer alleging payment and reply simply controverting such allegation, and not changing defense or cause of defense.

From Grant: DALTON BIGGS, Judge.

In Banc.

The plaintiff brought this action to recover certain sums alleged to have been due upon a contract whereby defendant leased certain land and personal property from plaintiff. The complaint sets forth two causes of action, the first alleging that about November 1, 1912, defendant leased the described real property for a term of two years at the annual rental of \$400; that about November 1, 1913, defendant paid to plaintiff the sum of \$400, being the first year's rent; but that the second year's rent had not been paid, and that by reason thereof there remains due from defendant to plaintiff the sum of \$400 with interest at 6 per cent, amounting in the aggregate to \$519.94. The second cause of action sets forth *in haec verba* certain agreements whereby defendant leased from plaintiff a flock of sheep, the particulars of said lease being unimportant here. It is alleged that at the end of the period of said lease plaintiff and defendant had an accounting whereby it was ascertained that defendant was indebted to plaintiff on account of said lease in the sum of \$2,022.50, which the defendant agreed to pay plaintiff forthwith; that no part of said sum had been paid; and that there was due thereon the sum of \$2,598.54.

The answer admits the execution of the lease, but denies generally the rest of the allegations contained in the first cause of action. The answer to the second cause of action admits the execution of the lease of the flock of sheep, and contains a general denial of all the other allegations of the complaint. The following affirmative matter appears in the answer:

"Defendant further answering plaintiff's complaint alleges: that all the matters set forth in plaintiff's complaint are fully paid, satisfied and discharged."

Upon these pleadings the case was set down for trial, and after a jury had been drawn it was discovered that no reply was made to the plea of payment set up in the answer. Plaintiff, over defendant's objection, was then permitted to file a reply denying such plea. Thereupon and after the reply was filed, defendant's counsel moved the court for a directed verdict on the ground that there were "no issues formed by the pleadings, to be submitted to the jury, as the answer of the defendant alleges a payment of the matters alleged in the complaint and this new matter has not been denied by the plaintiff, and the same is admitted on account thereof." This motion was overruled, and the trial proceeded; resulting in a verdict for plaintiff for the amount claimed, whereupon defendant moved the court to set aside the verdict and for a judgment on the pleadings upon the same grounds as the previous motion. This also was overruled, and the court rendered judgment for plaintiff on the verdict. Thereafter the defendant moved for a new trial, specifying as ground thereof: (1) Error of the court in allowing the reply to be filed after the jury had been drawn and accepted to try the cause; and (2) because defendant was not prepared to try the cause or able to have witnesses on the issues joined after the plaintiff was permitted to file his reply, and was compelled to go to trial unprepared to meet said issues. There was no showing made as to the absence of witnesses or the materiality of their testimony. This motion was overruled, and defendant appeals, assigning substantially as error the ruling of the court permitting the reply to be filed, the overruling of defendant's motion for a directed verdict, the entering of judgment for plaintiff, and the overruling of defendant's motion for a new trial.

AFFIRMED.

For appellant there was a brief over the names of *Mr. George J. Cameron* and *Mr. J. E. Marks*, with an oral argument by *Mr. Cameron*.

For respondent there was a brief over the names of *Mr. A. D. Leedy* and *Mr. George H. Cattnach*, with an oral argument by *Mr. Leedy*.

McBRIDE, C. J.—1. The objections urged by defendant are very technical and not of a character calculated, if applied, to promote justice, and are therefore to be considered from a technical standpoint. The following provisions of the Code are deemed to be applicable to the controversy at bar:

“The court may, at any time before trial, in furtherance of justice, and upon such terms as may be proper, allow any pleading or proceeding to be amended by adding the name of a party, or other allegation material to the cause; and in like manner and for like reasons it may, at any time before the cause is submitted, allow such pleading or proceeding to be amended, by striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, or when the amendment does not substantially change the cause of action or defense, by conforming the pleading or proceeding to the facts proved”: Section 102, Or. L.

“The court may likewise, in its discretion, and upon such terms as may be just, allow an answer or reply to be made, or other act to be done after the time limited by this code, or by an order enlarge such time; and may also, in its discretion, and upon such terms as may be just, at any time within one year after notice thereof, relieve a party from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect”: Section 103, Or. L.

“The court shall, in every stage of an action, disregard any error or defect in the pleadings or pro-

ceedings which shall not affect the substantial rights of the adverse party": Section 107, Or. L.

2. Section 102, Or. L., seems to contemplate chiefly amendments to correct pleadings or other papers then existing, and it may well be doubted whether it was intended to have application to a case where there was an entire absence of a pleading, but, assuming that it has such application, the filing of the reply after trial was begun is not prohibited by its terms or by any necessary implication, as the section permits such amendment to be made after trial begun, where it "does not substantially change the cause of action or defense."

Now, the causes of action here were for (1) rent due, and (2) upon an account stated. The reply did not change either of these. The defense was payment. The amendment did not change the defense or the "cause of" defense. It merely enlarged the right of plaintiff to introduce testimony upon the subject. This was the view taken by Mr. Justice MOORE in *Davis v. Hannon*, 30 Or. 192 (46 Pac. 785), which is a case in many respects similar to the present. To the contention that different evidence was required to sustain the defense after the amendment had been allowed during the trial, Mr. Justice MOORE answered:

"Fraud having been alleged in the amended pleading, different evidence from that required under the original answer was necessary to establish it; and, while this may be the test of a new issue, the question arises: Did the amendment substantially change the defense? The original answer denied the plaintiff's title altogether, and, if the proof had sustained the defendants' theory, it would have defeated the action. The amended answer conceded that plaintiff had the evidence of title, but alleged that it was fraudulent as to the plaintiff in the execution under

which the property was seized and sold, and, the proof having sustained this issue, plaintiff's title necessarily failed. In each instance plaintiff's title was attacked, and, while different evidence was demanded to sustain the allegation of fraud, we do not consider the amendment wrought a substantial change in the defense."

See, also, the opinion of Mr. Chief Justice STRAHAN in *Baldock v. Atwood*, 21 Or. 73 (26 Pac. 1058).

In the opinion of the writer, the filing of the reply was not an "amendment" of anything, but a new pleading and governed by Section 103, Or. L. Under that section the plaintiff's right, subject to the sound discretion of the court, was ample to permit him to file the reply, under the circumstances. It is only when the negligence of a party has been extremely great, or where there is an absolute bar by the statute, that a party should be turned out of court or visited by an adverse judgment for a failure to comply technically with some rule of procedure. In the case at bar it appears that plaintiff's attorney had seasonably prepared a reply and had it verified, but, not finding defendant's attorney in the city, put it by for future service and overlooked the matter until apprised of it by the opening statement of counsel at the trial, when he promptly asked leave to file it, which was granted. This was clearly "in furtherance of justice."

There was no motion made by defendant for a continuance of the case, which would no doubt have been granted if it had appeared that there were necessary and material witnesses to the fact of payment, whom, relying on the absence of a reply, he had failed to have present. Defendant might reasonably have expected that when plaintiff discovered that he was in default for want of a reply he would apply to the

court for leave to file one. When the case was set down for trial, it was upon the theory that there was an issue of fact to be tried. When the jury was impaneled, it was upon the same theory, and if defendant chose to neglect the precaution to have witnesses in attendance to try out the only issue that could possibly arise in the case, and gamble upon the chance that the court would refuse to permit the plaintiff to correct what was a plain and palpable oversight, he should not complain when his well-laid plan of defense is frustrated.

The judgment is affirmed.

AFFIRMED. REHEARING DENIED.

Argued November 26, 1920, affirmed January 4, 1921.

LEXINGTON INV. CO. v. WATSON.

(194 Pac. 172.)

Specific Performance—Evidence Held not to Show Performance of Condition of Contract to Convey.

1. Where one defendant in suit for partition asked specific performance, claiming interests in the property by virtue of a contract with some of his co-owners, whereby they were to convey their interests to him on condition that he support their mother during her lifetime, evidence held insufficient to show performance of that condition.

Specific Performance—May be Granted in Favor of Party Who Did not Sign Contract.

2. Specific performance may be granted in favor of a party who did not sign the contract as against other parties who did sign it.

Specific Performance—Contract not Signed by All Owners not Enforced.

3. Where the written contract showed on its face that it was the intention of the parties that it should not become effective until it was signed by all ten heirs of the former owner of the land, it will not be specifically enforced as against the six heirs who did sign it, especially after the lapse of 20 years during which the parties treated it as not in force.

From Douglas: **GEORGE F. SKIPWORTH, Judge.**

Department 2.

The Lexington Investment Company is an Oregon corporation, with its principal office at Roseburg. The Roseburg National Bank is a United States banking corporation, with its office at Roseburg. On April 17, 1874, James Watson died intestate in Douglas County, leaving a widow, Emily A., and ten children; Sarah J., J. F., D. L., E. B., Robert J., Charles F., Mary Kate, Emily E., Florence I., and John L. Watson. The daughter Sarah J. Hamilton died, leaving eight children, J. W., W. S., J. F., C. L., and Luther Hamilton, Inez E. Micelli, Julia Washburn, and Stella M. Richardson. The son D. L. Watson died, leaving six children: Robert R., Neil O., Laura L., and James Watson, Dorothy Watson-Tuttle, and Jotty Watson-Folsom. The daughter Mary Kate Watson married John A. Floyd, and the daughter Emily E. Watson married S. H. Hazard, and died September 24, 1883, leaving a son Roy, who died at the age of eight months, with his father as his only heir. On October 22, 1885, Florence I. Watson married A. M. Crawford.

At the time of his death James Watson was the owner of about 900 acres of land, the title to which descended to his widow and his sons and daughters above named. Through a deed from the daughter Mary Kate and John A. Floyd, her husband, the Lexington Investment Company is the owner of an undivided one-tenth interest in the land. It is alleged that on October 6, 1893, J. F. Watson and Virginia, his wife, E. B. Watson and Eleanor, his wife, conveyed an undivided one-fifth interest therein to the daughter Florence I. Crawford; that on June 8, 1917, she acquired an undivided one-tenth interest therein through a deed from L. H. and Mabel E. Hazard, his

wife, and Fannie Hazard, a widow, sole heirs of S. H. Hazard, and that Florence I. Crawford is now the owner of an undivided four-tenths interest. On October 15, 1887, Charles F. and Lucy A. Watson, his wife, conveyed their interest to John L. Watson. On February 14, 1893, he also acquired the interest of Robert J. Watson, and now claims to own an undivided three-tenths interest. Emily A. Watson, the widow of James, died about April 19, 1896. The land all lies in a contiguous tract. The investment company paid all the taxes on the property for the years 1912 to 1917, inclusive, amounting to \$1,004.90, and, in addition thereto, claims to have a tax certificate of sale in the sum of \$553.50 for the interest of John L. Watson, dated February 9, 1918. It also appears that there are five different judgment liens against him, the holders of which are made defendants.

As a cause of suit, the Lexington Investment Company, Florence W. and A. M. Crawford, W. S. and Queenie B. Hamilton, as plaintiffs, allege that the company is the owner of an undivided one-tenth interest in the property and has paid the taxes on all of it, and that it has a tax certificate of sale upon the interest of John L. Watson, as above stated; that Florence W. Crawford is the owner of an undivided four-tenths interest; that the eight Hamilton heirs are collectively the owner of an undivided one-tenth interest; that John L. Watson is the owner of an undivided three-tenths interest; that the six D. L. Watson heirs, including his widow, Laura L. Watson, are the owners of an undivided one-tenth interest. The complaint is in the usual form, and, among other things, alleges:

“That on account of, the large number of owners of said property, and on account of the location thereof, and the fact that the same is farming and

grazing land, an actual partition cannot be had without great prejudice to the owners, and in order to protect the rights and interests of the parties hereto, it is necessary that a sale of said property be had and the proceeds thereof distributed according to the rights of the parties hereto."

Plaintiffs pray for a decree that the property be sold and the proceeds thereof be applied, first, to the payment of the costs of the suit, second, to the claim of the Lexington Investment Company on account of taxes, and that the residue be divided among the owners of the property according to their respective interests as alleged in the complaint, except that the proceeds from the share of defendant John L. Watson shall first be applied to the tax certificate of the Lexington Investment Company, and next to the several judgment liens against him.

The defendants Laura L., Robert R., Kate, Neil O., Helen E., Laura L., Jr., and James Watson, Dorothy Watson-Tuttle, Clarence L. Tuttle, Jotty Watson-Folsom, and Harry E. Folsom filed an answer in which they "admit all the facts set out in plaintiffs' complaint," and "consent that a decree be rendered as prayed for."

The defendant John L. Watson filed an answer, in which he admits that his interest is subject to the taxes and liens described in the complaint, and that the heirs are as alleged, and denies all other material allegations, and as a further and separate defense alleges that Lexington Investment Company is the owner of an undivided one-tenth interest, that the Hamilton heirs are the owners of an undivided one-tenth interest, and that he is the sole owner of an undivided eight-tenths interest in the property subject only to the dower right of the defendant Laura L. Watson, widow of D. L. Watson, deceased, in and

to a one-tenth interest. He then pleads the making of an agreement by the other heirs as parties of the first part, with him as the party of the second part, on September 24, 1883, in and by which they did "bargain, sell and agree to convey" to him all of such lands, subject only to the dower right of his mother, Emily A. Watson, which, among other things, recites:

"It is the wish of all of the parties to this agreement that all of said lands shall be charged with the support of the said Emily A. Watson during her life and of the said Florence I. Watson if she shall survive the said Emily A. Watson, so long as she shall remain unmarried. It is agreed that the price to be paid by the said John L. Watson for said lands shall be two dollars per acre.

"It is therefore the condition of this agreement that all and each of said parties of the first part shall within a reasonable time after the death of the said Emily A. Watson and the death or marriage of the said Florence I. Watson and the payment to them of the sum of two dollars per acre for each acre of said land by the said John L. Watson, make, execute, and deliver to the said John L. Watson a good and sufficient deed or deeds conveying to him in fee simple all their interest in said lands.

"It is a further condition of said agreement that the said John L. Watson shall well and truly pay to the said Emily A. Watson during her life and after her death to the said Florence I. Watson until her death or marriage, interest on the said sum of two dollars per acre at the rate of eight per cent per annum.

"It is understood that each of the parties of the first part contracts only for the conveyance of his or her interest in the premises, and that the deeds to be made pursuant to this agreement are to be without any covenants of warranty."

It is then alleged that he accepted the contract, took possession of the premises under it, and entered

upon its faithful performance, and that ever since he has been, and is now, in possession, claiming to own an undivided eight-tenths interest in the property; that during all of such times it has been assessed to him and he has had the sole physical possession of the property and has made valuable improvements thereon; that no objections have been made, and that no one ever disputed his claim until about the time this suit was commenced; that he paid Emily A. Watson interest on the \$2 per acre during her lifetime; that since her death in April, 1896, he has been ready and willing to pay the \$2 per acre, with accrued interest; that upon delivery of the deed he is now ready and willing to make such payment; that the deed was never delivered and that its execution has been refused by the plaintiffs; that, after the execution of the contract, Florence W. Crawford attempted to acquire the interest of three other heirs, but that such conveyances are subject and inferior to the contract and do not convey any title; that he is the owner in fee simple of other adjoining land, and that there are several judgment liens against him which he is not in financial condition to satisfy and discharge; that a sale of the property would be very prejudicial to his interests, and that the land can be actually divided without injury to the plaintiffs. He prays for a decree that the court shall determine the amount of money due under his contract, and that upon the payment thereof the parties be ordered to execute and deliver to him a good and sufficient deed of their respective interests in the land, and for an actual partition of the property in lieu of a sale.

After denying all the material allegations of the further and separate answer, and for a further and separate reply, the plaintiffs allege the signing of

the contract of September 24, 1883, by some of the heirs only, and the failure and refusal of others to execute the instrument; that by reason thereof it was null and void; that it never did become a valid or binding contract and was never so treated or considered by anyone; that it was never delivered, and that the defendant never took possession under it or complied with any of its terms or provisions; that for more than 20 years after the death of Emily A. Watson the defendant never made any claim to the lands under the contract; and that his alleged agreement is stale.

The judgment lienholders and all the heirs and parties in interest were defendants, and John L. Watson was the only one who made a defense.

After the testimony was taken the Circuit Court made findings, upon which a decree was rendered in favor of the plaintiffs as prayed for in their complaint, from which the defendant appeals.

AFFIRMED.

For appellant there was a brief with oral arguments by *Mr. John T. Long* and *Mr. George Neuner, Jr.*

For respondents there was a brief over the name of *Messrs. Rice & Orcutt*, with an oral argument by *Mr. A. N. Orcutt*.

JOHNS, J.—James Watson was a pioneer of Douglas County, and his sons and daughters became prominent in the history of the state. At the time of his death he was the owner of about 900 acres of land in Douglas County, the south line of which for a distance of about three miles was on the east fork of the North Umpqua River. About 90 acres, known

as farm land, were on the river bottom. The remainder was hillside land covered with some brush and a little timber, more or less rocky, without water, and about its only value was for grazing purposes. After the death of the father, his widow, the defendant son, and the daughter Florence, who was then about 8 years of age, continued to reside upon the old home place. The rest of the family were more or less scattered. It appears that during that period the land was not very productive, and outside of stock range it was not of much value. To provide for the care, comfort, and maintenance of their mother in her old age and the daughter Florence in her youth, the idea was conceived of entering into a contract with the defendant for that purpose, in consideration of which the remaining heirs would convey to him their interest in the lands. This led to the preparing of the agreement of September 24, 1883, which was actually signed by D. L., J. F., E. B., Florence I., and R. J. Watson, and S. H. Hazard, six of the heirs out of the ten. But it was never signed by the defendant, with whom it was purported to have been made. It specifically names the nine brothers and sisters and their wives and husbands as "heirs of the estate of James Watson, deceased, of the first part, and John L. Watson, of the second part," and further recites:

"That the parties of the first part hereby bargain, sell, and agree to convey unto John L. Watson, the party of the second part, all of that part of the lands owned by James Watson in Douglas County, Oregon, at the time of his death which are situated on the south side of the east fork of the North Umpqua River, upon the terms and conditions following: Said lands are subject to the dower of Emily A. Watson, widow of the said James Watson, and the sole interest which the parties of the first part have or own

therein is as heirs, either direct or indirect, of the said James Watson."

This contract was dated September 24, 1883. The widow, Emily A. Watson, died in April, 1896. The daughter Florence married A. M. Crawford October 22, 1885. At the time the contract was signed the widow, the daughter Florence, and the defendant son were all living upon and in the actual possession of the lands; that is to say, there was no change of possession, and the defendant did not actually enter or take physical possession under the contract. From the wording of the contract it is apparent that it was then contemplated that it should be signed by all of the nine brothers and sisters, and that upon the performance of the terms and conditions therein stated the defendant should have a conveyance of all of their respective interests and become the sole owner of the property. Three of the heirs never did sign the contract, and it was never executed by the defendant as the party of the second part. In other words, upon the present theory of the defendant, he now claims and seeks the specific performance of a contract for a conveyance of an undivided six-tenths interest for the same identical consideration that he was to pay for a nine-tenths interest in the property. Under the contract, of which he now seeks specific performance, he would acquire a six-tenths interest only, whereas, if the contract had been signed by all the parties as originally intended, for the same consideration he would have acquired a nine-tenths interest. Under the contention which he now makes, defendant was entitled to a deed and specific performance upon the death of his mother. By the terms of the writing the provision for the care and support of Florence terminated with her marriage to A. M.

Crawford in October, 1885, and as to the mother it ceased with her death in 1896. By the defendant's own testimony, he never claimed that he had any right to a specific performance until at least six years after the death of his mother. After the marriage of Florence, the mother lived with the defendant for about one year, and the testimony is conclusive that during the last nine years of her life she lived with her daughter Florence.

1. Assuming that the contract had been duly executed and was in force, to entitle the defendant to a specific performance it was his duty to take care of and support his mother during all of her natural life. There is no claim or pretense that he in any manner supported or took care of her during the last nine years preceding her death, and there is testimony tending to show that at times she assisted him during that period. The claim of the defendant is not supported by the evidence. His own testimony is evasive, indefinite and uncertain. As we analyze the record, the signed contract was never legally delivered, and it was never the purpose or intent that it should be in force and effect until it was signed by all of the nine heirs, and three of them never did sign. Although it may have created a charge or lien upon the respective interests of the heirs in the property for the use and benefit of the mother and the daughter Florence for their care and support, the writing itself, as between the parties to it, was unilateral. The defendant did not promise, undertake or agree to do anything, and as to him it could not be enforced. If it meant anything, it was the duty of the defendant to care for and support his mother during her natural life, without any charge or claim against her or her estate. When she died he was ap-

pointed as administrator of her estate, and later filed a verified claim against it as follows:

"On or about 1876, to and including the year of on or about 1898, paid cash to Mrs. E. A. Watson, above deceased, for her support and the support of her family at divers times and in divers sums of money amounting in the aggregate to the sum of \$800."

And for one thing and another he presented a claim against her estate amounting to \$2,515.40. It is true that this whole claim was later compromised for about \$300, but the fact remains that he did verify and file a claim of \$800 against the estate of his mother for her care and support during the period covered by the alleged contract.

The testimony is clear and convincing as to how Florence Crawford acquired all of her interest. For the Hazard deed of one tenth she paid \$400 in money. As stated, the mother lived with Florence the last nine years of her life.

"Q. Do you recall the making of a deed to you by your brother E. B. Watson and your brother J. F. Watson of their interest in your father's lands?

"A. I do.

"Q. Will you state how that deed came to be made?

"A. Yes. I was in Portland, and my brother E. B. Watson said he would make over his part of the estate to me for taking care of my mother, and I said at the time, 'Perhaps Johnny won't like it,' and he said, 'That don't matter.' He said, 'J. F.,' that is my brother Finley, 'and I have talked it over, and we will make it over to you, and not to Johnny; you have taken care of Mother, and it is not right.' And he spoke for my brother Finley, too. I did not speak to J. F. about it.

"Q. And that is the reason for making of the deed, was it?

"A. Yes, sir.

"Q. Did they say anything, at that time, that you remember, about this old contract?

"A. No, sir, I did not hear anything about that at all, as I remember now.

"Q. Mrs. Crawford, has that, since the death of your mother, or even before her death, ever been recognized by you in any way as being in existence, or being a binding contract?

"A. I always considered the property mine, and I am sure until late years my brother did too."

2, 3. It is true, as appellant contends, that "Specific performances may be granted at the suit of one who did not sign the contract, against the other party who did sign it." That was held by this court in *Flegel v. Dowling*, 54 Or. 40 (102 Pac. 178, 135 Am. St. Rep. 812, 19 Ann. Cas. 1159). But in the instant case the writing was never signed by all the parties in interest, and without such signing it was never intended to become valid and binding. It is true that the defendant later received deeds from two of his brothers for their respective interests, and that he now has the record title to a three-tenths interest. As to the conveyance from one of them, the defendant testifies that the consideration was the cancellation of a valid and existing debt due and owing him from his brother. As to the other, he testifies that the consideration was a mutual exchange of properties. Both transactions are strong evidence that the defendant did not then, and never did, intend to claim or rely upon a specific performance of the alleged contract. The record discloses that the defendant failed and neglected to keep and perform the material provisions of the alleged contract, and after a lapse of more than 20 years he is not entitled to its specific performance.

We approve the findings of the Circuit Court as to the ownership and their respective interests; that is to say, that the Lexington Investment Company is

the owner of an undivided one-tenth interest; Florence W. Crawford an undivided four-tenths interest; the eight Hamilton heirs an undivided one-tenth interest; the defendant John L. Watson an undivided three-tenths interest; the six children of D. L. Watson, an undivided one-tenth interest, subject to the dower right of Laura L. Watson. Strong testimony was offered upon the part of the plaintiffs tending to show that the land could not be fairly divided, and that a division would be prejudicial to the respective owners. The trial court so found, and for such reason decreed a sale and a division of the proceeds. Here, again, the testimony on the part of the defendant is not clear or convincing. There is no merit in the defense.

After a careful reading of the record, the decree is affirmed.

AFFIRMED.

McBRIDE, C. J., and BROWN and BEAN, JJ., concur.

Argued November 16, 1920, reversed and decree entered January 4, 1921.

MYERS v. CLACKAMAS COUNTY.

(194 Pac. 176.)

Highways—Order Establishing Road cannot be Informally Changed to Conform to Petition.

1. Where the County Court formally entered an order opening a highway as established by the surveyor, which was on a line different from that designated in the petition, the highway cannot thereafter be changed to conform to the line in the petition by a mere verbal order of the county judge made without any notice or citation.

Appeal and Error—Jurisdiction cannot be First Challenged on Appeal.

2. In a suit to restrain the maintenance of a road, where the defendants filed no demurrer or other similar plea to the com-

2. Estoppel of litigant to deny jurisdiction of court by previous acts or conduct admitting jurisdiction, see note in 14 Ann. Cas. 1044.

plaint, but alleged that the road was duly established, defendants cannot on appeal challenge the jurisdiction of the court.

Eminent Domain—Use of Highway Illegally Encroaching on Plaintiff's Land Enjoined, Though Land was of Little Value.

3. Where the course of a highway was illegally changed so as to encroach on plaintiff's land, his constitutional rights were invaded, and an injunction to restrain the use of the highway as so changed will be issued, though the land was of little value.

From Clackamas: JAMES U. CAMPBELL, Judge.

Department 2.

The defendant Clackamas County is a legal subdivision of the state, and I. D. Larkins is one of its road supervisors. In 1866 the United States, under its Donation Act (9 Stat. 496), issued patent to Robert and Rachel Thompson for certain lands in Clackamas County, the title to the south half of which was conveyed to plaintiff by deeds of April 10, 1894, and September 25, 1899, and ever since said conveyance he has held the record title to said lands. In 1895 a petition was filed in the County Court of Clackamas County, to locate Road No. 457, the beginning point of the first course of which is described as "commencing in the middle or center of the Henry Engle and Noland Mill Road, thirty (30) rods west, more or less, and thirty (30) feet south, more or less, from the northeast corner of the Thomas Ross Donation Land Claim; thence east thirty-two (32) rods, more or less, to the center of the Arrington and Taylor Road." Based upon the petition, viewers were appointed, and, with the county surveyor, went upon the ground to locate the road. The petition describes a road which would have crossed that portion of plaintiff's lands in controversy, but as located the road did not run due east, but did run east $1^{\circ} 40'$ south. Upon that course the proposed road was laid

out and opened in 1895, and as then located it did not cross the land described in plaintiff's complaint as containing 377.22 square feet, more or less. As then established, the road was used continuously by the public from 1895 to 1917. The defendant Larkins is the owner of the John M. Drake Donation Land Claim, which lies west of and adjoining the Thompson claim, and north of and adjoining the Ross claim. After acquiring title to his land, the defendant Larkins desired to straighten Road No. 457 and run it due east in order to make it conform to the original petition for the road. After conference with the county judge and one of the commissioners, he moved the road over and made it run due east, or across that portion of plaintiff's land described in the complaint, and as thus changed it has ever since been used as a county road. As a result, the plaintiff brought suit, in which he alleges that on the — day of —, 1917, the "defendants, disregarding the rights of the plaintiff and without authority of law, entered upon the above-described real estate belonging to the plaintiff, and then and there dug up the surface of said land and constructed a grade for a roadbed the full length of said described tract, and undertook to, and did, construct a roadway for wagons and other vehicles over and upon said described property, and since said date of entry have at various times entered upon the same and have done work in the improvement of said roadbed so as to enable teams and wagons and the general public to pass over the same upon the said roadbed, and to travel thereon, and have thereby invited and do invite the general public * * to use and travel over the same, all without the knowledge or consent of the plaintiff, and the defendants threaten to and will * * continu-

ally and perpetually so trespass upon the said described real estate. * * " He prays for a decree that defendants be enjoined from further use, occupation, or trespass of the land, and for \$100 damages.

A joint answer was filed by the defendants, in which they deny the material allegations of the complaint, and as a further and separate defense allege:

"That the strip of land set forth and described in paragraph 3 of said complaint as lying and being between Road 74 and Road 457 in Clackamas County, Oregon, lies also within the boundaries of a road duly established and opened by the County Court of Clackamas County, Oregon; that said road has been traveled for some years; and that the plaintiff in this case knew these facts prior to the filing of his complaint."

Wherefore they pray for a decree that the suit be dismissed, with costs.

A denial was made of the new matter, and after plaintiff had offered his proof the defendant moved for a judgment of nonsuit, which was allowed as to Larkins and overruled as to the county.

After all the testimony was taken, the court made its findings of fact that the land in dispute "lies within the boundaries of a road duly established and opened by the County Court of Clackamas County, Oregon," and that the further and separate answer was sustained by the proof, and rendered a decree dismissing the suit without costs, from which plaintiff appeals, claiming that the court erred in sustaining the motion for nonsuit as to Larkins, in dismissing the suit, and in the rendition of its decree.

REVERSED. DECREE ENTERED.

For appellant there was a brief over the names of *Mr. Earle C. Latourette, Messrs. C. D. & D. C. Latour-*

ette and *Mr. Gordon E. Hayes*, with an oral argument by *Mr. Earle C. Latourette*.

For respondents there was a brief and an oral argument by *Mr. Gilbert L. Hedges*, District Attorney.

JOHNS, J.—The witnesses for both sides testified with reference to maps introduced in evidence, on which they indicated different points and places by the use of their fingers or a pointer. There is nothing on the maps to identify the places concerning which they were testifying. Referring to some specific point, the word “indicating” is found at least 75 times in the record. The attorneys and the trial court saw what the witnesses did, but, without being identified on the maps, such a record is of no value to this court and has no meaning. Again, points of the compass are not shown on the maps. The proof is conclusive that the plaintiff is the holder of the record title to the land described in the complaint. Hence it devolves upon the defendants to show how and when that title was divested. They undertook to do this by introducing the record for the petition and location of Road No. 457 in 1895. The petition for this road calls for a due east course, which, if followed, would have taken the land in controversy, but, as surveyed, viewed, and located, it ran east 1° 40' south, and did not cross the land in dispute. The road was thus established October 10, 1895, and as then located was continuously used as a county road until some time in 1917, when it was changed by the defendant Larkins, claiming to act by authority of the county, and placed upon a due east course and across plaintiff's land. In the laying out and opening of a county road, upon receipt of the report of

the viewers, "the court shall cause said report, survey, and plat to be recorded, and thenceforth said road shall be considered a public highway, and the court shall issue an order directing said road to be opened.

1. The journals of the County Court of October 10, 1895, recite that—

"It is therefore ordered that said change in said road be established, and that the field-notes and plat of the survey of the same be recorded."

It thus appears that the County Court, on October 10, 1895, actually approved of the county road as it was then surveyed and defined by the field-notes, and as it was then located upon the ground. That order was an official public record of the County Court and entered in its journals. There is no claim or pretense that the order of October 10, 1895, was ever set aside or vacated. There is no evidence that the County Court took any official action in 1917 in changing the bed of the road, or that it ever made an official order authorizing or directing such change. So far as the record shows, the only authority is based upon conversations between the county judge, defendant Larkins, and one of the commissioners. No official action was ever taken. From such conversations it clearly appears that the change was made upon the assumption that an error was made by the surveyor and viewers in locating the road in 1895, and that it could be corrected by a verbal order of the County Court in 1917 so as to make the actual roadbed conform to the road petition of 1895, upon which it was based. All such acts were *coram non judice*. They were not based upon any citation, showing or petition. In such matters the county can only speak through its journals, and no official action

was ever taken, neither was any journal entry made. Under such a record, no authority has ever been cited, and none will be found, which will authorize a County Court in 1917, verbally or otherwise, to vacate or modify an order of a County Court made in 1895, without the filing of a petition, the issuance of a citation, or the making of some kind of a showing.

2. It is contended that the instant suit should have been dismissed for want of jurisdiction. No demurrer or other similar plea was filed to the complaint. The defendants met the issues, and as a further and separate answer alleged that the road was duly established, and, in legal effect, that the defendants had the right to make the change in the road. That was what the trial court found, and for such reason dismissed the suit. The defendants, having met the issues and pleaded an affirmative defense without challenging the jurisdiction, cannot at this time raise the question of jurisdiction: *Kitcherside v. Myers*, 10 Or. 21.

3. It is true that the land is of but little value, but the question involved is a constitutional right. The proof shows that the plaintiff is the owner of the land, that in 1917 the defendant Larkins, acting under the advice of the County Court, but without any official authority, entered upon said land and undertook to appropriate it, make the change and open it as a county road, and that as a result it has been used and traveled by the public ever since said date.

The decree will be reversed, and one entered here enjoining the defendants from trespassing or using the lands described in the complaint as a county road, with costs to the appellant.

REVERSED. DECREE ENTERED.

McBRIDE, C. J., and BEAN and BROWN, JJ., concur.

Argued at Pendleton October 28, 1920, affirmed January 4, 1921.

GIROUX v. BOCKLER.

(194 Pac. 178.)

Specific Performance—Evidence Held to Show Inventory of Stock in Store Properly Taken.

1. In a suit for specific performance of a contract for sale of a store, the preponderance of the testimony *held* to show that a substantially correct inventory was taken, after a few minor changes acquiesced in by the defendant, so that he cannot make failure to furnish an inventory an excuse for refusal to execute notes and make payments stipulated in contract.

Specific Performance—Evidence Held not to Sustain Defendant Buyer's Claim of Fraudulent Representation of Volume of Business.

2. In an action for specific performance of a contract selling a mercantile business, preponderance of the evidence *held* not to sustain defendant's claim of false representation as to the volume of business done.

Specific Performance—Sale and Distribution by Receiver Held Proper Remedy for Performance of Contract Selling Mercantile Business.

3. Where buyer of a corporation and its mercantile business assumed charge and subsequently refused to execute notes for payments stipulated, and seller brought suit for specific performance, and a receiver was appointed, a direction for sale of the property by the receiver to the highest bidder, proceeds to be used to pay expenses under receivership sale, unpaid bills contracted by defendant for goods, balance due to plaintiffs, less one half of receivership expenses due and transfer of the capital stock and remainder to the defendant as his share of the proceeds, *held* the proper remedy.

Receivers—Order for Receiver Takes Effect from Date of Filing, not of Signature.

4. Where the application for receiver was presented and the order signed before the complaint was filed, and the clerk corrected the discrepancy between the dates, the proceeding was not thereby rendered void, since the order took effect from date of its filing, not of signature.

Receivers—Defendant's Inability to Handle Business Sufficient Cause.

5. Where defendant bought a company doing a mercantile business, and failed to perform his part of the contract, the fact that defendant was not capable of handling so large a business success-

1. Specific performance of personal property contracts, see notes in 5 Ann. Cas. 269; 10 Ann. Cas. 934; Ann. Cas. 1915D, 788.

fully, and its management must result in bankruptcy for himself and the company, justifies the appointment of a receiver at seller's instance.

From Baker: GUSTAV ANDERSON, Judge.

In Banc.

This is a suit, among other things, to compel the specific performance of a written agreement signed by the defendant to purchase the capital stock of the Durkee Mercantile Company, a corporation operating a general store at Durkee, in Baker County.

The complaint, after alleging the ownership of the stock by plaintiff, sets up an agreement, which is as follows:

"This agreement made by and between Maurice Giroux, J. T. Giroux and J. I. Giroux doing business as Giroux Bros., and Charles Bockler; the said Giroux Bros. agree to sell to Charles Bockler all the capital stock of the Durkee Mercantile Company, the value of said stock to be determined by an inventory of all the merchandise at flat cost in the store, and store building and store fixtures excluding the Post Office fixtures, for the agreed price of \$3,500 for said store building and fixtures and one acre of ground. The said Charles Bockler to pay for this stock as follows: Five thousand (\$5,000) dollars, cash, balance to be settled by notes as follows: Two thousand dollars on or before April 1st, 1919; One thousand dollars on or before November 1st, 1919; One thousand dollars on or before November 1st, 1919; [sic] Bal. due on stock as per inventory on or before November 1st, 1920, and \$3,500 on or before November 1st, 1921. Said notes to be deposited in the Citizens National Bank together with the certificates of stock, and said certificates of stock held as collateral until the notes are paid. The said Giroux Bros. to assume all indebtedness and collect all accounts outstanding at the time of the transfer. It is also understood and agreed that said Charles Bockler will keep stock, fixtures and building insured for value until notes are

paid. Eight per cent interest and interest paid semi-annually.

“CHARLES BOCKLER.

“GIBOUX BROS.

“By TREFFLE.”

It is alleged that immediately after the execution of the agreement the parties thereto mutually made the inventory required therein, and thereby ascertained and determined the flat cost in the store, of the goods so inventoried to be approximately \$12,000; said inventory and ascertainment of cost being completed on November 9, 1918, prior to which date defendant had paid to plaintiff in compliance with the terms of the agreement the sum of \$5,000; that on said date defendant took over from plaintiffs and assumed complete possession and control of all the store building and fixtures of said company, together with all the goods and merchandise then owned by it, of all books and accounts of said company and all of its real and personal property of every kind and character whatever; and that the plaintiffs performed on their part all of the conditions of the contract, and delivered to defendant all of said property except the certificates of stock which were to be held in the Citizens National Bank of Baker, Oregon, as security to plaintiffs for the purchase price of the property.

Another paragraph details with greater particularity the property turned over to defendant, and alleges that on the date of so turning over the property the plaintiffs paid and satisfied all debts, contracts, and obligations of the Durkee Mercantile Company, and passed its books to defendant completely closed up, except as in the contract otherwise provided, so that defendant took said property subject to no debts or liabilities whatever; that he acquired in addition to said store building, merchan-

dise and fixtures, valuable rights in certain executory contracts for the purchase of goods; for the lease of lands; for the insurance of property; for the license to do business, and certain other choses of action; that plaintiffs completely withdrew from the business and affairs of the Durkee Mercantile Company; and that defendant has ever since been in the complete control thereof. The complaint sets forth at length the nature of the business transacted by the Durkee Mercantile Company, and alleges that in order to conduct the business profitably it was necessary that the stock of goods be kept up, and accurate accounts of the affairs of the store be kept, but charges that in these and many other particulars defendant had been negligent to the extent that there was danger that the business would become bankrupt.

It is charged that defendant sold merchandise to the amount of about \$12,000, and had kept no account of such sale; that he was conducting the business in his own name and appropriating the proceeds to his own use; and that he had commingled a block of about \$2,400 worth of his own goods with the stock of the Durkee Mercantile Company so that it was impossible to segregate them. In short, without going further into the prolix details of the complaint, its tenor and substance amounted to a charge that the business was being managed in a way that would ultimately destroy it, and thereby render the stock of the Durkee Mercantile Company valueless.

There was a prayer for an order enjoining defendant from further disposing of the property and merchandise; for a receiver *pendente lite*; for an order directing defendant to execute the notes specified in

the original contract; for a sale of the goods and property on hand to pay the amount due plaintiffs, and for general equitable relief.

A general demurrer was interposed and overruled. The defendant then answered, admitting that plaintiffs were partners, but denying generally every other allegation of the complaint except as thereafter affirmatively stated. The affirmative matter in brief is this: That for about two years before the execution of the contract set forth in the complaint defendant was conducting a country store at Pleasant Valley in Baker County; that about October 5, 1918, J. T. Giroux (usually called Trefle Giroux) came to defendant's store, and offered to sell him a stock of goods and a store building at Durkee, conducted by Giroux Brothers, and informed defendant that if he would buy said stock and building the plaintiffs would invoice and sell said goods at flat cost in the store, and to determine the flat cost he said that plaintiffs had and would furnish defendant the invoices and bills at the store, showing the same, and would sell defendant their store buildings, ground, and fixtures, excluding postoffice fixtures, for \$3,500; that on October 12, 1918, defendant at the request of plaintiffs went to Durkee and looked over the store buildings and location, and plaintiffs for the purpose of deceiving defendant at that time informed him that the firm had at one time carried a stock of between \$10,000 and \$11,000, but that at that time it had run down to about \$8,000; that for the same purpose plaintiffs falsely and fraudulently represented to defendant that Giroux Brothers were doing an average cash monthly business of from \$3,300 to \$3,500, which said statement plaintiffs

knew to be false, when in fact their cash business did not exceed \$700 or \$800 monthly; and that:

“The defendant had never been in plaintiff’s store before said time, and had never been in the town of Durkee but once before, and had no knowledge or information as to the volume of the cash business being conducted by the plaintiffs, and that defendant at said time was in the plaintiffs’ store but a very few minutes, and did not have sufficient time to examine or investigate the same, and at the said time the defendant had full and complete confidence in the said plaintiffs, and believed and relied upon the said plaintiffs’ statements so made to him as aforesaid.

“That thereafter, and on or about the 25th day of October, 1918, the said plaintiff again came to the defendant’s store at Pleasant Valley, Oregon, and again informed the defendant that the said stock of goods would invoice about the sum of \$8,000, and that the cash business which the plaintiffs were doing at their said store at Durkee, Oregon, would average throughout the year at least \$3,300 per month, and that the said firm was also doing a large credit business, and again assured the defendant that if the defendant would purchase the said stock of goods, buildings, and fixtures, the plaintiffs and the defendant would invoice the goods from the bills and invoices which the plaintiffs then had at the store at the actual cost price of said goods in the store, and that in making said invoice none of the goods which were unmerchantable or shelf-worn or unsalable would be invoiced, and that all such unmerchantable, shelf-worn, and unsalable goods would be removed from the store by the plaintiffs, and should not be included in the invoice by the plaintiffs; and the defendant at said time, believing the said statement, falsely and fraudulently made by the plaintiffs, that the plaintiffs were doing an average cash business at said store of not less than \$3,300 per month, and relying upon the same, and believing that the plaintiffs would furnish the invoices and bills showing the flat

cost of the goods in the store, signed the said contract mentioned in plaintiffs' complaint, and then and there paid over to the plaintiffs the sum of \$1,000.

"That thereafter, and on or about the 3d day of November, 1918, the defendant went to plaintiffs' store at Durkee, Oregon, and with the plaintiff Treffe Giroux commenced to list the goods in said store and warehouse of the plaintiffs, leaving the flat cost price of the goods to be inserted later; and for a short time the plaintiff Treffe Giroux and this defendant examined each article as listed, and thereupon at the suggestion of the plaintiff Treffe Giroux the said plaintiff, for the purpose of cheating and defrauding the defendant suggested to the defendant, that he would examine and call off the various articles, and defendant could enter the same in the list then being made; and thereupon the defendant did write down the articles as called off by the said plaintiff without examining the same or the boxes and packages in which the same were contained, and as the same were called off by the said plaintiff the defendant wrote the same in the list then being prepared from that time on until the full list, as plaintiff supposed, of all the goods in the store and warehouse had been listed, which said list was completed on or about the 9th day of November, 1918, after which the defendant paid to the plaintiffs the further sum of \$4,000, paid in money and in government bonds, which bonds were accepted by the plaintiffs in lieu of cash; and the defendant thereupon left said store in charge of the plaintiffs, and returned to his store at Pleasant Valley, and packed up the stock of goods he then had on hand at his store, which were then and there of the reasonable value of the sum of \$2,400, and caused the same to be shipped to the store of the plaintiffs at Durkee, Oregon, where the same were placed in the store and warehouse of the plaintiffs by the plaintiffs and by the defendant, and thereupon, and on the 23d day of November, 1918, the defendant went into the posses-

sion of the said store, warehouse, and stock of goods purchased from the plaintiffs as aforesaid.

"That the said list as prepared by the plaintiffs and the defendant as aforesaid was taken over by the plaintiff Treffe Giroux at the time the same was completed on November 9th, 1918, and remained in his possession until on or about the 24th day of December, 1918, during which time, without the defendant's knowledge or consent, the said plaintiff Treffe Giroux carried out and inserted opposite the different items contained in said list a false and fictitious valuation, which was far in excess of the flat cost price of substantially all of the items listed, and in addition thereto the said plaintiff Treffe Giroux, for the purpose of cheating and defrauding the plaintiff, added to the said list a large number of items, all of which were listed by the said Giroux after the list had been, as defendant was informed and believed, completed, and substantially all of said additional items were either unsalable and unmerchantable, or were not on hand at the time.

"That from the 9th of November, 1918, when said listing was completed as aforesaid up to the 23d day of November, 1918, the defendant left the plaintiffs in charge of said store, and took possession of said store on the 23d day of November, 1918; and, after being so in possession a short time, defendant discovered a large proportion of the boxes, cartons, and packages, which had formerly contained hats, shoes, and various items of merchandise had fraudulently been called off and listed as containing said articles of merchandise, but which were in fact at the time empty, and contained no article of merchandise, but were listed as merchandise on hand; but this defendant did not for a considerable time thereafter discover to the full extent the fraud of the plaintiff in calling off and having the defendant write down in the list the articles not on hand, but which were pretended to be on hand by the plaintiff in calling off the same in said empty cartons, boxes, and packages aforesaid; and on or about the 24th day of Decem-

ber, 1918, the plaintiff brought the said list, prepared as aforesaid, to the defendant, containing the said fraudulent additions, as aforesaid, and the items fraudulently called off and listed but not on hand, with the false and fictitious values placed opposite each of said items by the plaintiff, as aforesaid; and at said time the defendant refused to accept said list or the valuations placed thereon, and demanded a new appraisement and invoice of said stock of goods, and demanded that the plaintiffs produce their invoices, showing the flat cost of the same, which the plaintiffs from day to day and up to about the 1st day of February, 1919, promised the defendant they would do, at which time the plaintiffs left this defendant in possession of said stock of goods, store buildings, and warehouse, and came to Baker and employed counsel to commence this suit; and thereupon defendant employed counsel, and a demand was made upon the plaintiffs either to repay to this defendant the \$5,000 which the defendant had paid to the plaintiffs, or that the plaintiffs would with the defendant make a true and correct inventory and appraisement of the stock of goods, and determine the flat cost thereof according to the terms of said contract; and thereupon the plaintiffs refused to re-invoice the goods, or to repay to the plaintiff the sum of \$5,000, or to have the stock of goods appraised by disinterested appraisers.

“That on account of the fraudulent practices on the part of the plaintiffs towards this defendant and the conversion of the goods made by the plaintiffs in securing the appointment of a receiver herein and in taking possession and ousting the defendant therefrom, the entire transaction between the plaintiffs and the defendant should be set aside, canceled and held for naught, and defendant should be reimbursed the sums of money by him expended and lost by him in the enterprise on account of the fraud practiced upon him by the plaintiffs as hereinbefore stated.”

There were allegations attacking the fairness of the receiver, averments showing injury to defendant by reason of the alleged fraud committed, and a prayer for rescission and general equitable relief.

The new matter in the answer was put in issue by appropriate denials in the reply. A trial was had, resulting in findings and a decree for plaintiffs, which decree, omitting the formal portions, is as follows:

“That plaintiffs have and recover of and from defendant the sum of \$10,390.33, together with interest on said sum at the rate of 8 per cent per annum, from and after the 9th day of November, 1918; and that the same is secured by and charge and lien upon the following properties, to wit: all the goods, wares, and merchandise in the warehouse and store building and appertaining to the stock of merchandise and business owned and operated by and in the name of the Durkee Mercantile Company, a corporation, up to the 9th day of November, 1918, in the town of Durkee, county of Baker, State of Oregon, and also upon the said store building and the one acre of land upon which said building stands, all of which properties are situated in said town of Durkee, county of Baker, State of Oregon, and which properties as between plaintiffs and defendant were the subject matter of sale in the contract of sale made and entered into by and between plaintiffs and defendant on or about the 22d day of October, 1918; and which said merchandise, store building and one acre of land upon which said building stands, together with the goods, wares, and merchandise brought by defendant and by him mingled with said property so sold into one inseparable whole, are now in charge and possession of the receiver heretofore appointed herein on the 15th day of April, 1919.

“It is further considered, ordered, and decreed that all of said properties, namely, the said stock of goods, wares, and merchandise, including the said

merchandise so brought and mingled by defendant with said general stock of merchandise as a whole, and also the said store building and the said one acre of ground upon which said building stands, be sold in the manner provided by law, and that said sale be made by said receiver after due notice of sale by publication, said publication of notice to be as provided by law in cases of sale under execution, and said sale to be so made to the highest and best bidder at the best obtainable price and for cash; and that the proceeds of such sale, when so made and confirmed, be applied until exhausted in the following order: (1) to the full payment of the expenses of said receivership and of said sale; (2) to any balance or unpaid bills or lawful obligations incurred by said defendant while in charge of said business from November 9, 1918, until April 15, 1919, in the purchase of merchandise so mingled with said general stock of merchandise; (3) to plaintiffs in the said sums for which they have judgment as aforesaid, less one-half of said receivership expenses, upon their duly transferring to defendant or his order all of the capital stock of the said Durkee Mercantile Company, a corporation; (4) the remainder, if any there be, and whatever the same may be, to said defendant as his interest in said proceeds: Provided, that such distribution shall be made only after said receiver shall have filed his report and account, and after the sale so made shall have been confirmed.

"It is further considered, ordered, and decreed that neither party recovers costs or disbursements of the other."

The defendant appeals from this decree, assigning as error:

"The court erred in giving a decree to the plaintiffs.

"The court erred in not entering a decree in favor of the defendant as prayed for in defendant's answer.

"The court erred in appointing a receiver.

"The court erred in not removing the receiver and in denying the defendant's motion to remove the receiver.

"The court erred in overruling defendant's demurrer to the amended complaint, and in not sustaining said demurrer to said amended complaint.

"The court erred in striking out from defendant's answer to the amended complaint Paragraphs XIV and XV, and each thereof.

"The court erred in refusing to rescind the contract and to restore to the defendant the moneys paid by the defendant to the plaintiffs and the admitted value of the goods placed in the store by the defendant, to wit, the sum of \$5,000 paid to the plaintiffs by the defendant, and the sum of \$2,400, the admitted value of the goods placed in the store by the defendant, being his Pleasant Valley stock of goods, all of which moneys and goods came into the possession of the plaintiffs through the receiver appointed at the instigation of the plaintiffs.

"The court erred in not placing the defendant *in statu quo* as far as possible, when the records and files of the court in this case showed that the plaintiffs put it beyond the power of the defendant to perform the contract upon his part by the commencement of this suit and the appointment of a receiver, and by the proceedings enjoining the defendant from performing his contract in any respect.

"The court erred in decreeing a performance upon the part of the plaintiffs after it had been established by all of the evidence that the plaintiffs had never performed upon their part." AFFIRMED.

For appellant there was a brief with oral arguments by *Mr. George E. Allen* and *Mr. John L. Rand*.

For respondents there was a brief with oral arguments by *Messrs. Nichols & Hallock*.

McBRIDE, J.—The length of the pleadings and the volume of the testimony have necessitated a preliminary statement exceeding the usual compass, and even with every abridgment possible it is difficult to make the issues tried entirely clear.

Leaving out of consideration the question of fraud assigned by the defendant as a reason for not complying with the terms of his agreement, we must determine by the terms of that covenant what the defendant promised to buy and plaintiffs agreed to sell. All previous negotiations and conversations of the parties, so far as the contract is not affected by false representations and deceit, are merged in that document. The written contract is not difficult of interpretation. The plaintiffs were contracting to sell and the defendant to buy all the stock of the Durkee Mercantile Company. It was an agreement for the sale of that stock. Incidentally, such purchase would give the defendant entire control of the merchandise and property of the company, the value of which represented the value of the stock, and without which the stock itself would be of little or no worth, unless the goodwill of the corporation had in itself some value. In the present instance the parties agreed upon the value of the store and the land upon which it stood, and agreed among themselves as to the method of fixing the value of the stock, or rather the amount that defendant should pay for it, by adding to the value of the store, fixtures, and ground, which was placed at \$3,500, the flat cost of the merchandise as it should appear from an inventory to be taken for that purpose.

1. If the plaintiffs have seasonably furnished such an inventory, then defendant is in default, and has

violated the terms of his agreement, unless he was induced to enter into it by reason of the alleged false representations of plaintiff. The first question, therefore, is whether or not a true inventory was taken. We are of the opinion that the preponderance of the testimony indicates that an inventory substantially correct was taken, and after a few minor corrections was acquiesced in by the defendant. The method of taking it was seemingly by the consent of both parties, and, considering the fact that it was necessary to keep the store open and transact business while the inventory was progressing, it appears to have been a reasonable and convenient method. The parties worked in concert. The goods had upon them or upon the boxes containing them the cost mark of the Durkee Mercantile Company. This mark was explained to defendant, and was one that could be readily comprehended. The writer had no difficulty in understanding it from the brief explanation in the testimony. J. T. Giroux, because more familiar with the store, took down the goods and called the cost mark, which the defendant without objection wrote down in the inventory book; the extension or translation into dollars and cents being for the time omitted on account of the pressure of business. These extensions were subsequently made by J. T. Giroux in the evenings after business hours and the inventory after some minor corrections was turned over to the defendant, and while defendant has charged numerous fraudulent entries which to consider in detail would consume much space uselessly, he has, in our opinion, failed to establish by any preponderance of testimony the falsity of a single item. It is true that several witnesses testified as to their estimate of the

value of some articles mentioned, but much of the testimony discloses a lack of recent experience in the lines concerning which they testified, and the agreement did not provide for an inventory at the then present value of the articles, but at the original flat cost. Nor does this appear unfair when we consider that from 1916 to 1918 the prices of most classes of merchandise greatly advanced, so that depreciation in quality by time might be more than compensated by increase in the selling price of such portions of the stock as had been purchased prior to 1918. In addition to this, there is testimony of other witnesses for plaintiffs, of equal or greater experience and opportunity for observation, who estimate the value of the stock as quite equal to that shown in the inventory. After a careful examination of the whole testimony we are satisfied that the inventory prepared by the joint efforts of J. T. Giroux and defendant substantially complied with the written agreement, and that failure to furnish an inventory cannot be urged as an excuse for defendant's refusal to execute the notes and make the payments stipulated in the contract.

2. We will now consider the alleged false representations by reason of which defendant claims he was induced to enter into the contract of purchase. Chief among these is the claim that J. T. Giroux, acting for Giroux Brothers, represented that the Durkee Mercantile Company was doing a cash business of from \$3,300 to \$3,500 per month, when in fact it was doing a cash business of only \$700 or \$800 monthly. The sole testimony that such a representation was made is that of defendant, and this is stoutly denied and contradicted by the testimony of J. T. Giroux. As we have not the advantage of see-

ing the witnesses and observing their demeanor on the stand, and as there is nothing in their testimony on this point which should induce us to credit that of one above the other, we must necessarily find that this charge of fraud is not established by the preponderance of the testimony. Such evidently was the conclusion of the learned trial judge, who has filed a written opinion in this case. The same may be said of other alleged misrepresentations occurring prior to the execution of the written agreement.

3. As the case stands, we do not find sufficient evidence to permit us to hold that defendant had any legal or equitable justification for refusing to execute the notes or make the payments called for in the written agreement, and the only other subject that calls for extended discussion is the propriety of the remedy decreed by the Circuit Court. Upon this subject we quote from the opinion of the learned circuit judge:

“Plaintiffs’ prayer is for general relief as well as for specific performance of the contract. Since there can be no rescission under the state of facts proved and no damages, and since by his acts in the premises defendant has in any event precluded a restoration of the *statu quo* either by return of the property or its equivalent, and has refused to carry out that part of the contract which calls for execution of the promissory notes, plaintiffs would be entitled to a decree carrying out the provisions of the contract in its ultimate effect. No such decree, however, can be entered or enforced as to compel the execution of promissory notes and compelling the faithful conduct of the business until such notes become due; nor can the court by any decree and through a receiver assume to superintend such a business with its numerous details during so great a length of time.

"By the written contract defendant agreed to execute and pay when due interest-bearing notes as follows: \$2,000 due April, 1919; \$1,000 due November 1, 1919; the balance of the inventory price of the merchandise November 1, 1920; and \$3,500, the agreed value of the realty, due November 1, 1921. His default consists in his refusal to pay the amounts past due and in refusing to execute the notes as agreed to.

"It is further to be observed that under the terms of the written contract and the negotiations between the parties the defendant was given possession of the property, with power and authority to sell the merchandise and from such sales to pay the promissory notes. The foregoing outlines the only remedy whereby the contract as a whole may by a decree be carried out in its ultimate effect, having in mind in this connection the facts heretofore mentioned that the negotiations and the manner and means whereby the parties set about to carry the written contract into effect incontrovertibly establish that the merchandise and the store and ground were, upon completion of the payments of the notes, to be the property of defendant, while in the meantime the funds whereby those notes were to be paid were to be realized by defendant from sales of that merchandise. Under such state of facts the seller could not maintain *assumpsit* as upon such notes as would not, under the terms of the contract, be due at the time of commencement of the suit; but where the defendant is in default in payments that were due and he also refuses to perform the contract by executing the notes that would become due, at the future dates under the terms of the contract, the seller is on such state of facts entitled to the remedy against such breach by immediate enforcement of the whole obligation, such right existing by reason of the buyer's breach of agreement as a whole: 24 R. C. L., pp. 97, 98; *Kelley v. Pierce*, 16 N. D. 234 (112 N. W. 995, 12 L. R. A. (N. S.) 180); *Stephenson v. Repp*, 47 Ohio St. 551 (25 N. E. 803, 10 L. R. A. 620); *Pasha*

v. *Bohart*, 45 Mont. 76 (122 Pac. 284, Ann. Cas. 1913C, 1250).

"Before outlining in terms what is in the opinion of the court the only proper and consistent remedy, reference may be had to the matters of what occasioned the necessity of a receiver and the consequent expenses thereof, with a view to equitable adjustment in view of all the circumstances. On the one hand, had the defendant executed the notes and proceeded to manage the business in the manner each of the parties contemplated, the plaintiffs could have had no cause of suit until those notes became due, unless he violated the agreement in the meantime. Such a course, had it been chosen, could not have deprived defendant of adjustment of or redress for any errors, mistakes, or other defects, if any, that might exist, and not open and known to him at the time, and which he might, while acting in good faith, subsequently discover. For reasons that appear obvious in view of the nature of the contract, had the contract been thus consummated, self-interest of each of the parties to the present controversy would itself have virtually compelled co-operation to the end of the success of defendant's venture. On the other hand, had plaintiffs proceeded as greater care and prudence would have suggested, no absolute delivery of possession and control and no mingling of goods should have been permitted until the transaction was closed and the notes delivered simultaneously. In either of these events the transaction would have been either wholly consummated or wholly rescinded. These circumstances, however, do not obviate or alter the fact that defendant did take possession and thereupon proceeded as heretofore mentioned and obligated himself as stated above. The result was the necessity of a receiver. That does not effect the remedy, except that in view of all those circumstances the court is of the opinion that when it comes to application of the proceeds, from which the expenses of the receivership must be met, those expenses should be so apportioned as to be

borne equally between plaintiffs and defendants: 23 R. C. L. 106.

“In connection with the remedy heretofore suggested, the following facts are observed: That the legal title to the property named, i. e., the merchandise and the realty, was not under the agreement vested in defendant, but he has an equitable interest therein by virtue of the agreement and the payments he made; that the subsequent payments to be made were in the main to be realized from sales of the merchandise; that the merchandise and the realty together constitute the business institution—the property involved in the contract; that defendant continued as long as he was in charge so to mingle the merchandise delivered into his possession by plaintiffs with the merchandise that he brought and later supplied, and so mingled the proceeds of sales made from the indiscriminate whole, and so managed and treated the same as one and the same stock and as one fund and as one business that it cannot be segregated. Therefore, and consistent with the ultimate effect of the contract, and those several acts, the only available remedy whereby the rights of each are subserved and enforced is a decree for the payment of the balance due under the contract, to be secured by sale of the property in question, such sale to be effected by and through the receiver at the highest obtainable price after due publication of notice of such sale; and the proceeds of such sale, when such sale shall have been confirmed to be applied in the following order: To the expenses of the receivership and of the sale; to any unpaid bills contracted by defendant in the purchase of goods thus mingled; to the balance found due to plaintiffs, less one half of said receivership expenses, upon due transfer of all of the capital stock; the remainder to the defendant as his interest in such proceeds. In connection with the authorities last cited, see 24 R. C. L., pp. 445, 446, par. 744; 23 R. C. L., p. 98; 39 Cyc. 1794. The court is further of the opinion that

upon equitable principles neither party should recover costs or disbursements of the other."

These observations appear sound, and we adopt them.

4. Incidentally, a question is raised as to the legality of the appointment of a receiver in the first instance. The application was presented to the judge before the complaint was filed, and the order was then signed and dated by him, either upon the theory that the complaint had already been filed or that the order and complaint would be filed on that date, which was April 14, 1918. The complaint and order were taken to the clerk on the morning of April 15th, and he noticed the discrepancy between the date of filing and the date of making the order, which he corrected by erasing the original date and inserting the figures "15th." The date attached by the judge was evidently an inadvertence; but, as the order took effect only upon the date of its filing, and not upon the date of the signature, it was not such an irregularity as would render the proceeding void. The filing gave the order validity, not the date affixed to it; *Smith v. City of New York* (Super. Ct.), 4 N. Y. Supp. 449; *Young v. Hamilton*, 135 Ga. 339, (69 S. E. 593, Ann. Cas. 1912A, 144, 31 L. R. A. (N. S.) 1057). It further appears that while the court disregarded the objection made to the regularity of Mr. Glenn's appointment, it did, on May 12, 1918, re-appoint him, so that at the time of the trial there was no question as to the regularity of his appointment. We think, however, that the original appointment was sufficient.

5. It seems evident from the testimony that while a man of wider business experience and greater

business capacity might have succeeded in the mercantile venture which the defendant embarked upon, it was a larger business than he was capable of handling successfully, and that the result of his management would have been the bankruptcy of the company and of himself, if he had been permitted to continue in charge. We think the court acted wisely in appointing a receiver, and nothing appears in the testimony to indicate that as such officer Mr. Glenn in any way has discriminated between the parties to the litigation. The fact that some years before he had been a clerk in the employ of the Durkee Mercantile Company may well have been a reason for his appointment, inasmuch as his familiarity with the business and with the customers of the concern would enable him to perform his duties as a salesman to greater advantage than would be the case with a stranger.

The decree of the Circuit Court is affirmed.

AFFIRMED.

Argued September 30, appeal dismissed October 12, 1920, rehearing denied January 4, 1921.

SMITH SECURITIES CO. v. MULTNOMAH COUNTY.

(192 Pac. 654; 194 Pac. 428.)

Appeal and Error—Appeal Purely Statutory.

1. An appeal is statutory, and does not exist as a matter of right.

Taxation—No Appeal from Decree Setting Aside Assessment, Proceeding Being Summary.

2. No appeal lies from a decree of the Circuit Court setting aside an assessment in a proceeding brought under Section 3613, L. O. L., such statute providing a special proceeding, summary and complete within itself.

ON PETITION FOR REHEARING.

Taxation—Neither the County Assessor nor the County Board of Equalization Act as a Court.

3. A county assessor is not a court, and in lowering or raising valuations on property a county board of equalization is not acting or sitting as a court.

Taxation—No Appeal from Decree of Circuit Court Setting Aside Assessment on Appeal from County Board of Equalization.

4. Where, on appeal to the Circuit Court, pursuant to Section 4299, Or. L., from the county board of equalization, which denied petition to have an assessment reviewed and corrected, the Circuit Court set aside the original assessment and reduced the valuation, no appeal on behalf of the county lies from such decree of the Circuit Court to the Supreme Court under Sections 548 and 549.

From Multnomah: GEORGE W. STAPLETON, Judge.

Department 2.

In 1911 and 1912 the R. R. Thompson Estate Company, one of the plaintiffs herein, constructed the Multnomah Hotel on block 44 in the City of Portland, at a cost of something more than a million dollars. On March 1, 1916, on a basis of 75 per cent of its cash value, the land was assessed at \$360,000 and the building at \$335,000, making a total of \$695,000.

On August 25, 1916, the property was sold to the plaintiff Smith Securities Company for \$575,000, under an agreement that the taxes should be prorated between the grantor and the grantee for the current year.

The plaintiffs, feeling aggrieved at the assessment, petitioned the board of equalization of Multnomah County to have it reviewed and corrected, and asked that the land for that year be assessed at \$207,000 and the building at \$150,000 or a total of \$357,000. A hearing was had before the board of equalization, and the petition was denied. The plaintiffs appealed from the decision of the board to the Circuit Court of Multnomah County, where a trial was had

and testimony was taken. The court found that the assessment was made at a greater sum than the true cash value of the property on the first Monday in March, 1916; that on that date its actual cash value was \$575,000; and that the assessment should be reduced. A decree was rendered setting aside the original assessment and ordering that the property be assessed at \$575,000. The defendant appeals, assigning error in the findings and rulings of the Circuit Court.

APPEAL DISMISSED.

For appellant there was a brief over the names of *Mr. Walter H. Evans*, District Attorney, and *Mr. Samuel H. Pierce*, Deputy District Attorney, with an oral argument by *Mr. Pierce*.

For respondents there was a brief over the names of *Mr. A. P. Dobson* and *Mr. Robert Krims*, with an oral argument by *Mr. Dobson*.

JOHNS, J.—The appeal from the decision of the board of equalization to the Circuit Court and the proceedings in that court were founded upon Section 3613, L. O. L., which provides as follows:

“Any person who shall have petitioned for the reduction of a particular assessment, or whose assessment has been increased by the board of equalization, who shall be aggrieved by the action of such board, may appeal therefrom to the Circuit Court of the county. The appeal shall be taken and perfected in the following manner, and not otherwise:

“1. The party desiring the appeal from the action of such board of equalization may cause a notice, to be signed by himself or attorney, to be filed with the county clerk of the county within five days, excluding Sunday, from the time the assessment-roll is returned to the county clerk by the board of equalization.

"2. Within five days of the giving of such notice the appellant shall file with the clerk of the Circuit Court a transcript of the petition for reduction of assessment, or so much of the record of the board of equalization as may be necessary, intelligently to present the questions to be decided by the Circuit Court, together with a copy of the order or action taken by the board of equalization, the notice of appeal and record of the filing thereof; thereafter the Circuit Court shall have jurisdiction of the matter, but not otherwise,

"The appeal shall be heard and determined by the Circuit Court in a summary manner, and shall be determined as an equitable cause. Either the appellant or the county as appellee shall be entitled to the compulsory attendance of witnesses and to the production of books and papers. If, upon hearing, the court finds the amount at which the property was finally assessed by the board of equalization is its actual full cash value, and the assessment was made fairly and in good faith, it shall approve such assessment; but if it finds that the assessment was made at a greater or less sum than the market value of the property, or if the same was not fairly or in good faith made, it shall set aside such assessment and determine such value, and a certified copy of the order or judgment of the Circuit Court shall be sufficient warrant for the levying and collecting of taxes against such property, and upon such valuation so determined. No proceedings for the levying or collection of taxes against any property shall be stayed by the reason of the taking or pendency of the appeal from the board of equalization; but in event the assessment is decreased by the court on appeal the tax collector shall refund to the person paying taxes on such property any excessive amount of taxes collected, and in event the assessment is increased by the court on appeal the property shall be liable for the deficiency on the amount of such increased valuation. The provisions of law governing costs and disbursements on appeal shall be applicable hereto."

It is required that the appeal be taken and notice filed with the county clerk within five days, excluding Sunday, after the assessment-roll is filed with the county clerk by the board of equalization, and that within five days after giving the notice the appellant shall file with the clerk of the Circuit Court a transcript of the record.

1, 2. This statute provides a special proceeding and is summary and complete within itself. Although it does provide for an appeal to the Circuit Court by an aggrieved property owner, it does not give either party the right to appeal to the Supreme Court. This court has many times held that an appeal is statutory, and does not exist as a matter of right. It is true that the case here was tried upon its merits, and that no motion was filed to dismiss. But the question of jurisdiction is involved. On principle, *Portland v. Nottingham*, 58 Or. 1 (113 Pac. 28), is conclusive that in this kind of a case the county does not have the right of appeal. For want of jurisdiction, and appeal is dismissed.

APPEAL DISMISSED.

McBRIDE, C. J., and BEAN and BURNETT, JJ., concur.

Denied January 4, 1921.

PETITION FOR REHEARING.

(194 Pac. 428.)

On petition for rehearing. PETITION DENIED.

Mr. Walter H. Evans, District Attorney, and *Mr. Samuel H. Pierce*, Deputy District Attorney, for the petition.

Mr. Robert Krims and *Mr. A. P. Dodson*, contra.

JOHNS, J.—In the former opinion and on its own motion the court dismissed this case for want of jurisdiction. In its petition for a rehearing, appellant county contends:

“That the jurisdiction of this court in the present case may be sustained on three grounds: (1) That the Supreme Court is vested, by the provisions of the Constitution, with authority to revise all final decisions of the Circuit Courts; (2) that the appellate powers generally conferred upon the Supreme Court by Section 548, L. O. L., are unaffected by any provision of the statute relating to appeals from the board of equalization; and (3) that this court, having entertained appeals of this character for a long period of time, is now justified in refusing to alter its practice.”

On the first point, it cites *In re North Pacific Presbyterian Board of Missions v. Ah Won et al.*, 18 Or. 339 (22 Pac. 1105), and *Mitchell v. Powers*, 16 Or. 487, 492 (19 Pac. 647). Apparently, such decisions sustain appellant's contention. In June, 1902, Section 1 of Article IV of the Constitution was amended by an initiative vote of the people. *Kadderly v. Portland*, 44 Or. 118 (74 Pac. 710, 75 Pac. 222), was decided after that amendment. In that case, on page 156 of 44 Or., on page 723 of 74 Pac., this court held:

“There is no common-law right of appeal. The right is wholly statutory unless expressly secured by the Constitution. The Constitution of Oregon, Article VII, Section 9, does not guarantee a right of appeal from every finding by an inferior court or tribunal. While this section confers upon the Circuit Courts appellate jurisdiction, it leaves the regulation of the mode of proceedings on an appeal and the limitation of the cases wherein an appeal may be taken to be provided by statute. Whenever the legislature determines this question, and fixes the rule in any particular case, the question is thereby settled whether or

not the right to prosecute an appeal exists. The supervisory control conferred upon the Circuit Courts is exercised in this case, as it is in the case of all other inferior tribunals and courts, by writs of review, *mandamus*, injunction, etc., and in fact it is this right of supervisory control which plaintiffs are now invoking in this case."

Upon the second point, appellant cites Section 9 of Article VII, of the Constitution, which provides:

"All judicial power, authority, and jurisdiction not vested by this Constitution, or by laws consistent therewith, exclusively in some other court, shall belong to the Circuit Courts; and they shall have appellate jurisdiction and supervisory control over the County Courts, and all other inferior courts, officers, and tribunals."

As pointed out in the Kadderly case, such supervisory control is exercised "by writs of review, *mandamus*, injunction, etc." It also cites Section 548, Or. L., which defines a judgment or decree, and Section 549, Or. L., which provides that any party to a judgment or decree may appeal therefrom.

3. It must be conceded that a county assessor is not a court, and that in the lowering or raising of valuations upon property a county board of equalization is not acting or sitting as a court. The assessor simply places a valuation upon a person's property for the purpose of taxation, and upon a proper petition the board either modifies or approves his action. Section 4299, Or. L., provides for an appeal from the action of the county board to the Circuit Court, and specifies the manner in which it shall be taken. In its decision on the appeal, the Circuit Court simply ascertains the value of property for assessment purposes. It may well be doubted whether the placing of

such value is a judgment or decree, within the meaning of either Section 548 or 549.

4. Far greater power is conferred upon the board of control, now the state water board. It is authorized to make findings as to the date and amount of the appropriation of water, its beneficial use, and where it shall be used, which, in the absence of objections, become final. Section 5745, Or. L., of the act creating that board, provides:

“Appeals may be taken to the Supreme Court from such decrees in the same manner and with the same effect as in other cases in equity, except that notice of appeal must be served and filed within 60 days from the entry of the decree.”

A like provision is made in the Public Utilities Act, Section 6086, Or. L., which provides:

“Either party to said suit, within 60 days after the entry of the judgment or decree of the Circuit Court, may appeal to the Supreme Court.”

As stated in the former opinion, Section 4299, Or. L., provides for an appeal by the property owner to the Circuit Court from the valuation of his property as fixed by the board of equalization; but that is a summary, special proceeding, and the act does not provide for an appeal by either party from the decision of the Circuit Court to this court. It provides, among other things, that, at the trial, “either the appellant or the county as appellee shall be entitled to the compulsory attendance of witnesses and the production of books and papers.” The word “appellant” applies, and is confined, to the property owner, and the word “appellee” is limited to the county and clearly implies that it does not have the right of appeal to this court.

It is true, as appellant’s counsel point out, that there have been three decisions of this court in this class of

cases, and that each of them was decided on the merits: *Northern Pacific Ry. Co. v. Clatsop County*, 74 Or. 250 (145 Pac. 271); *In re Weyerhaeuser Land Co.*, 85 Or. 434 (165 Pac. 1164); *Douglas Land Co. v. Clatsop County*, 87 Or. 462 (169 Pac. 790). In the Weyerhaeuser case the county was the appellant, and in the other two it was the property owner. The question of the right of appeal from the Circuit Court was not mentioned, discussed, or decided in any one of those cases, and is not *stare decisis*. After a careful consideration of appellant's clear and concise petition, a rehearing is denied,

APPEAL DISMISSED. REHEARING DENIED.

BROWN, J. (Specially Concurring).—I concur in the result reached by Justice JOHNS, holding that this court is without jurisdiction to review the proceedings of the Circuit Court had under Section 4299, Or. L. It is a general rule in most jurisdictions that where a tribunal exercises a special, limited jurisdiction conferred by statute, and in which the procedure is not according to the course of the common law, no appeal lies from its action therein unless such appeal is expressly provided by statute: 2 Cyc. 540. By the provisions of Section 4299, Or. L., any person who shall have petitioned for the reduction of a particular assessment, or whose assessment has been increased by the board of equalization, and who shall be aggrieved by the action of such board, may appeal therefrom to the Circuit Court of the county. The appeal shall be heard by the Circuit Court in a summary manner. The Circuit Court is authorized, if it finds that the assessment was made at a greater or less sum than the actual full cash value of the property, or if the same was not fairly or in good faith made, to set aside such

assessment and determine the value. It is likewise provided that the order of judgment of the Circuit Court shall be sufficient warrant for the levying and collection of taxes against such property upon the valuation determined.

In construing laws governing the right of appeal this principle should be kept in mind that—

“In a controversy concerning the valuation of the property only, the action of the court is generally considered ministerial rather than judicial and consequently is not reviewable on appeal; but if the controversy is with reference to the right of the state to tax the property, or concerning the constitutionality of the act providing the method of ascertaining the value of the property, then the question is a judicial one and the decision is appealable”: 2 R. C. L., § 7.

It is said in *Copp v. State*, 69 W. Va. 440 (71 S. E. 580, 35 L. R. A. (N. S.) 669), that—

“In controversies concerning the valuation of property only, there is no appeal from the Circuit Court to this court, because the action of the court is ministerial rather than judicial”—citing *Mackin v. Taylor County Court*, 38 W. Va. 338 (18 S. E. 632); *McLean v. State*, 61 W. Va. 537, (56 S. E. 884); *Bluefield Water Works Co. v. State*, 63 W. Va. 480 (60 S. E. 403).

It is held in *Kimber v. Schuylkill County*, 20 Pa. St. 366:

“When special appeal to a subordinate is given, there can be no appeal thence to the supreme court unless expressly given, but *certiorari* will lie to review regularity.”

The opinion of the court was rendered by BLACK, C. J., who further stated that—

“The judges, when hearing these appeals, are acting as assessors of taxes. We venture to hope that it will be many years before we will be called on to review

the assessments of every man in the commonwealth who is dissatisfied with the taxes charged against him. It would require an amount of local information which the County Courts do certainly possess, but which we cannot expect to attain."

It is said, in 2 Cooley on Taxation, page 1393:

"In some states an appeal is given from the assessors, or from assessing boards, to some specified courts, to which are given limited powers of review. But the right to such an appeal is purely statutory * * ."

The Supreme Court of Colorado, in *Board of Commissioners of Teller County v. Pinnacle Gold Min. Co.*, 36 Colo. 492 (85 Pac. 1005), states, in the matter of appealing a case like the instant one from a decision of the lower court:

"The court has not jurisdiction to entertain this appeal. The statute concerning appeals to the District Court from the assessor and from the board of county commissioners is similar to the previous law upon this subject, passed in 1889. There is no provision for an appeal from the District Court."

It is held that—

"The statute under consideration is the source and measure of the power and jurisdiction both of the board of commissioners and the District Court to afford relief to a complaining taxpayer. The remedy thereby given is purely statutory, and exists only because the statute gives it. Thereunder the District Court has not original jurisdiction of the subject matter of the controversy contemplated, which is the alleged unjust assessment, and could not in the first instance, but only by appeal, entertain the petition of one bringing his case within it. * * The doctrine is tersely stated by Judge COOLEY, who said that 'the rule is well established that where an appeal is allowed to any court from an assessing body, whatever the

grade of the court, it is one of limited jurisdiction for such purpose, and must keep strictly within it.' "

Many times this court has held that the right to appeal is statutory. It was said by this court, speaking through Mr. Justice EAKIN in *Sears v. Dunbar*, 50 Or. 36 (91 Pac. 145), that—

"The right to appeal a case is one conferred by statute, and is limited to cases falling within the terms of the act."

In the case of *Portland v. Gaston*, 38 Or. 533 (63 Pac. 1051), Chief Justice BEAN, delivering the opinion of the court, stated:

"The legislature has the power to define in what cases, and under what circumstances, and in what manner, an appeal may be taken to this court. * * But, when the legislature has prescribed rules of procedure in special proceedings, such rules must be followed, and, if they limit the right of appeal or specify the court or tribunal in which such proceedings shall terminate, they must govern."

In the case of *Town of La Fayette v. Clark*, 9 Or. 225, WALDO, J., in speaking for the court, said:

"Appeals for the removal of causes from an inferior to a superior court for the purpose of obtaining trials *de novo*, are unknown to the common law, and can only be prosecuted where they are expressly given by statute."

In the case of *State v. Security Savings Co.*, 28 Or. 410, 417 (43 Pac. 162, 163), this court said that "the right of appeal is purely statutory." In *School Dist. v. Irwin*, 34 Or. 431, 435 (56 Pac. 413), it is stated:

"The principle is well settled that, where a particular jurisdiction is conferred upon an inferior court or tribunal, its decision will be final, unless provision is made by statute for an appeal: *McGowan v. Duff*, 41 Ill. App. 57; *Hileman v. Beale*, 115 Ill. 355 (5 N. E.

108); *In re Storey*, 120 Ill. 244 (11 N. E. 209). And it has been said by this court that 'appeals for the removal of causes from an inferior to a superior court, for the purpose of obtaining trials *de novo*, are unknown to the common law, and can only be prosecuted when they are expressly given by statute.' "

In *Kearney v. Snodgrass*, 12 Or. 311, 314 (7 Pac. 309, 311), this court says:

"Until the right of appeal is created by statute it does not exist as a strict legal right."

Justice STRAHAN, in *Fisk v. Henarie*, 15 Or. 89, 90 (13 Pac. 760), wrote:

"The right to an appeal depends entirely upon the statute. If the statute does not confer it, it does not exist."

In *City of Portland v. Nottingham*, 58 Or. 1 (113 Pac. 28), Justice BURNETT said:

"An appeal is not a matter of primary right. It is a privilege, and he who would enjoy that privilege must show some statute conferring it upon him."

In the *Ah Won Case*, 18 Or. 339 (22 Pac. 1105), the decision was really put upon the ground that the decree appealed from was an exercise of general equity jurisdiction relating to the custody of the persons and as such was appealable independent of the statute under which the boys' and girls' aid society was acting. The same idea is advanced by Chief Justice MOORE in *Ex parte Bowers*, 78 Or. 390, 395 (153 Pac. 412). The opinion in the *Goldsmith Estate*, 12 Or. 414 (7 Pac. 97, 9 Pac. 565), was written by Justice THAYER, who also wrote the opinion in the *Ah Won* case. In the *Goldsmith* case, the judge points out that the insolvent act there under consideration "does not, either by express language or necessary implication, give the right of appeal to the court in any case."

Believing that this court is not authorized to act as a board of assessors in the matter of the valuation of property for the purpose of taxation, I concur in the conclusion reached by Mr. Justice JOHNS.

Argued at Pendleton October 28, 1920, affirmed January 4, 1921.

WINTERMUTE v. OREGON-WASH. R. & N. CO.

(194 Pac. 420.)

Commerce—Federal Liability Act Exclusive as to Injuries from Handling Interstate Commerce.

1. Federal Employers' Liability Act, as amended by Act of April 5, 1910 (U. S. Comp. Stats., §§ 8657-8665), is an exercise of the paramount authority of Congress over interstate commerce, so that such statute controls all litigation for injuries growing out of the handling of interstate commerce.

Master and Servant—Assumption of Risk Defense Under Federal Act, Except Where Safety Appliance Act is Violated.

2. Under federal Employers' Liability Act, Section 4 (U. S. Comp. Stats., § 8660), eliminating the defense of assumption of risk in cases of injury through violation of any safety appliance statute, the defense remains as at common law in other cases.

Master and Servant—"Assumption of Risk" and "Contributory Negligence" Distinct Defenses.

3. The defenses of assumption of risk and of contributory negligence are separate and distinct in legal effect, although they may rest largely on the same state of facts; assumption of risk being an implied contract condition, while contributory negligence arises from the injured employee's own tort.

Master and Servant—Knowledge Indispensable to Assumption of Risk.

4. Notice or knowledge and appreciation of danger are indispensable to a servant's assumption of risk of injury.

2. On abrogation of assumption of risk by federal Employers' Liability Act, see notes in *Ann. Cas.* 1915B, 481; 47 *L. E. A.* (N. S.) 62; *L. E. A.* 1915C, 69.

3. The question of distinction between assumption of risk and contributory negligence is discussed in notes in 18 *Ann. Cas.* 960, 21 *L. E. A.* (N. S.) 138.

4. On servant's knowledge as element of defense of contributory negligence, see note in 49 *L. E. A.* 33.

Master and Servant—Engineer, Knowing Location of Pits in Darkened Roundhouse, Held to Assume Risk.

5. Where a switch engineer going to the registry-stand in the roundhouse, darkened by steam when he entered, knew the location of engine pits, and undertook to pass between the pits obscured by the steam, instead of using a safe way, he assumed the risk of injury by stepping into one of them.

From Baker: GUSTAV ANDERSON, Judge.

In Banc.

This is an action against the defendant railway corporation, engaged in interstate commerce, to recover damages for injuries alleged to have been suffered by the plaintiff, a switching engineer in the employ of the defendant at Huntington. At the time of the accident the plaintiff was about 40 years of age, and had been in the defendant's employ some ten years in various capacities about its yards and roundhouses—as wiper, fireman, and latterly as a switch engineer. The mishap upon which the action is based occurred about 6:30 o'clock on the morning of December 31, 1916.

It is said in the complaint and admitted by the answer, in substance, that the plaintiff's first duty each day was to register at a desk in the defendant's roundhouse, for which purpose he entered that building, which was so constructed that when an engine is resting on a track therein, directly under the machine and between the tracks is a pit constructed there for the purpose of enabling mechanics to work under the locomotive in a standing position. The charge of negligence against the defendant is couched in the following language:

“The plaintiff alleges that defendant was then and there careless and negligent in the following particulars, to wit:

“(a) That said defendant failed to maintain said roundhouse, and that portion thereof which defend-

ant [plaintiff] was obliged to traverse on the way to the register-stand in a properly illuminated condition, and that the same was dark.

“(b) That while plaintiff was in said roundhouse on his way to the register-stand said defendant, through some of its careless servants, whose names are unknown to the plaintiff, caused an engine to emit a large quantity of steam, by reason of which said roundhouse became so darkened it was impossible for the plaintiff to see.

“(c) That the said defendant failed in its duty to provide the plaintiff a safe place in which to work, in that the said defendant did not in any manner whatsoever provide any safeguards around said pits to prevent its employees from falling therein, or to give warning of the proximity to the said pits, so that the employee could protect himself when the said roundhouse became so darkened that the said pits could not be seen and distinguished.”

It is further alleged in substance that by reason of the negligent acts of the defendant, and while plaintiff in the performance of his duty was going to the desk to register, it became necessary for him and he sought to go by another direction, and fell into one of the pits, suffering injuries which he describes, all to his damage in a sum alleged.

The defendant denies all negligence and damages charged against it, and for a first separate defense alleges the following matter:

“That on the thirty-first day of December, 1916, it was engaged in the operation of a railroad in the States of Oregon, Washington, and Idaho, as common carrier of passengers and freight for hire; that said railroad extended through the town of Huntington, Baker County, Oregon, and that on said date, and for a long time prior thereto, plaintiff was and had been a switch engineer in the employ of the defendant at Huntington, Oregon, and that during the period of his said employment, he, the said plaintiff, had habitually

been in and around said roundhouse, several times each day, and knew the construction of the same and the manner in which the work and operations in said roundhouse were conducted and operated; that during all of said times the work done in said roundhouse and the operations therein required that steam be permitted to escape from engines in said roundhouse, and the emission of steam from engines in said roundhouse was a daily occurrence, as the plaintiff then and there during all of said time well knew; that the plaintiff knew of the arrangement of said roundhouse, of the locations of the pits therein, and of the fixtures, appliances, and appurtenances therein, and knew of all the conditions in and around said roundhouse; that in said roundhouse there was provided a safe way whereby to enter the same and to proceed to the registering desk in said roundhouse, and that said way was the customary and safe way to travel into said roundhouse and to said registering desk; that the plaintiff knew of the dangers incident to work in said roundhouse and of the dangers incident to the traveling or proceeding through said roundhouse and in and about the same; that the plaintiff knew of the condition of the light in said roundhouse during said times, both when steam was being emitted or had been emitted from locomotives and when it was not being emitted or had not been emitted; that the foregoing conditions referred to presented risks assumed by the plaintiff, and that whatever injury, if any, the plaintiff sustained in his fall into an engine pit in said roundhouse occurred and was the result of the risks understood, known, appreciated, and assumed by the plaintiff in his employment and work."

For a second separate defense the answer counts upon much of the same matter before described, and charges contributory negligence upon the part of the plaintiff. The reply traverses all of the new matter in the answer, and avers in substance that the way pursued by the plaintiff in going to the registry desk was the usual, customary, and habitual way that the plain-

tiff and the defendant's other employees took in going to the desk, that it was the way provided by the defendant for that purpose, and that there was no other way provided which was less dangerous, or in which the likelihood or danger of falling into the pits was less in degree than the way pursued by the plaintiff at the time of the injury. At the close of the plaintiff's case on the evidence introduced at the trial, the court granted a judgment of nonsuit on the motion of the defendant, and the plaintiff appeals.

AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. A. A. Smith*.

For respondent there was a brief with oral arguments by *Mr. A. C. Spencer* and *Messrs. Nichols & Hallock*.

BURNETT, C. J.—1, 2. Without dispute this action is brought under the federal Employers' Liability Act of April 22, 1908 (Chapter 149, 35 U. S. Stat. 65). This act was amended April 5, 1910 (Chapter 143, 36 U. S. Stat. 291; U. S. Comp. Stats., §§ 8657-8665), but not in a way affecting the present issue. By Section 3 of that statute, contributory negligence of the employee who brings action against his employer serves only to mitigate the damages in proportion to the amount of negligence attributable to the employee. Section 4 reads thus:

“That in any action brought against any common carrier under or by virtue of any of the provisions of this act to recover damages for injuries to, or the death of any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where the violation by such common car-

rier of any statute enacted for the safety of employees, contributed to the injury or death of such employee.”

As Congress legislated in this matter in the exercise of its paramount authority over interstate commerce, the laws thus promulgated constitute the exclusive standard by which litigation for injuries growing out of the handling of interstate commerce must be adjudicated: *Second Employer's Liability Cases*, 223 U. S. 1, 55 (56 L. Ed. 327, 38 L. R. A. (N. S.) 44, 32 Sup. Ct. Rep. 169); *Seaboard Airline Ry. v. Horton*, 233 U. S. 492 (58 L. Ed. 1062, Ann. Cas. 1915B, 475, L. R. A. 1915C, 1, 34 Sup. Ct. Rep. 635); *Oberlin v. Oregon-Wash. R. & N. Co.*, 71 Or. 177 (142 Pac. 554). The principle is also laid down in *Seaboard Airline Ry. v. Horton*, 223 U. S. 492 (58 L. Ed. 1062, Ann. Cas. 1915B, 475, L. R. A. 1915C, 1, 34 Sup. Ct. 635, see, also, Rose's U. S. Notes), that since the federal Employers' Liability Act has expressly eliminated the assumption of risk in certain specified cases, the intent of Congress is plain that in all other cases, such assumption shall have its former effect as a bar to action by the injured employee. It will be noted that the only limitation the statute in question places upon the defense of assumption of risk is that the injury shall not have been caused or affected by a violation of any statute enacted for the safety of employees. It is not pretended in the instant case that there was any violation of any safety statute involved. This situation leaves the defense of assumption of risk as it was at common law, for the purposes of this case.

3. Another proposition well established by the precedents is that the defenses of assumption of risk and of contributory negligence are separate and distinct in legal effect, although as applied in practice they may largely rest upon the same state of facts. The

rule is thus stated in a note in 49 L. R. A. 33, 50, reporting the case of *Limberg v. Glenwood Lumber Co.*, 127 Cal. 598 (60 Pac. 176, 49 L. R. A. 33), reading as follows:

“The doctrine of assumed risks obtains without necessary reference to the existence of negligence. If the servant, with knowledge of a defect in the master’s premises, and of a danger and risk incident thereto, continues in the service of the master without proper notice to the latter, he assumes the risk incident to the service and growing out of the existence of the defect, and this without regard to the degree of care which he may exercise in the performance of his labors: *Texas & N. O. R. Co. v. Conroy* (1892), 83 Tex. 214 (18 S. W. 609); *Texas & P. R. Co. v. Bryant* (1894), 8 Tex. Civ. App. 134 (27 S. W. 825). See, also, *Probert v. Phipps* (1889), 149 Mass. 258 (21 N. E. 370); *Tuttle v. Detroit, G. H. & M. R. Co.* (1887), 122 U. S. 189 (30 L. Ed. 1114, 7 Sup. Ct. Rep. 1116, see, also, Rose’s U. S. Notes); *Southern P. Co. v. Seley* (1894), 152 U. S. 145 (38 L. Ed. 391, 14 Sup. Ct. Rep. 530); *Snedra v. Libera* (1896), 65 Minn. 337 (68 N. W. 36); *Anderson v. C. N. Nelson Lumber Co.* (1896), 67 Minn. 79 (69 N. W. 630); *Wuotilla v. Duluth Lumber Co.* (1887), 37 Minn. 153 (33 N. W. 551); *St. Louis, Ft. S. & W. R. Co. v. Irwin* (1887), 37 Kan. 701 (16 Pac. 146); *Pennsylvania Co. v. Witte* (1896), 15 Ind. App. 583 (43 N. E. 320).”

The annotations on this subject are continued in the case of *Rase v. Minneapolis etc. Ry. Co.*, 107 Minn. 260 (120 N. W. 360, 21 L. R. A. (N. S.) 138). The principle established by such cases is that assumption of risk is an implied condition of the contract between the employer and the employee, while negligence of the employee contributing to his hurt arises from his own tort; or, as expressed in *Davis Coal Co. v. Polland*, 158 Ind. 607 (62 N. E. 492, 92 Am. St. Rep. 319):

"Assumption of risk is a matter of contract, express or implied, while contributory negligence is a matter of conduct."

The rule is thus stated in *Ball v. Gussenhoven*, 21 Mont. 321 (74 Pac. 871):

"If the defense of assumption of risk is maintained, the question of the existence of contributory negligence does not arise, because, if plaintiff assumed the risks of the employment, he cannot recover, even if he exercised the highest degree of care."

In argument, the effort of the plaintiff seems to be to array the case of *Oberlin v. Oregon-Wash. R. & N. Co.*, 71 Or. 177 (142 Pac. 554), against the proposition that the defenses of contributory negligence and assumed risk are distinct. On that question the opinion there turned upon a matter of pleading, and assumption of risk was laid out of the case because not properly averred. The defense there was predicated on allegations of rules covering the activities of employees and certain specified violations of those regulations upon the part of the plaintiff. It was there said:

"Where parties are free to contract as to the conditions and regulations under which they will prosecute an undertaking, disregard or disobedience of rules is referable to negligence, and is not properly classified under assumption of risk."

"Disregard or disobedience of rules" implies negation which *ex vi termini* characterizes negligence. On the other hand, assumption of risk suggests affirmative action or volition by which the actor evinces knowledge and adoption of the conditions and circumstances under which he performs the act in question. The defense in the *Oberlin* case was based solely upon infraction of the defendant's rules. It was nowhere

stated in the answer there that the plaintiff was required to go between the cars to couple them, or that he knew the risk attendant or appreciated it and so assumed the hazard of the employment. As to the defense of assumption of risk, the Oberlin case is not in point in the present juncture.

4. Lastly, it is sound doctrine that notice or knowledge and appreciation of the danger are indispensable to the assumption of risk: *Winona v. Botzet*, 169 Fed. 321 (94 C. C. A. 563, 23 L. R. A. (N. S.) 204).

5. With these principles in mind, the testimony given by the plaintiff and his single witness as to the circumstances of the accident is here set down in substance in narrative form. The plaintiff testified practically as follows:

"The only thing calling a switch engineer into the roundhouse was the matter of registering. The desk prepared for that purpose had been in the roundhouse about a month before the accident. The building was a 12-pit roundhouse, the pits being about four feet deep where the engines entered from the east. The floor in the house outside of the pits and between them consisted of tarred wooden blocks, black in color. There were four lights between the pits. I went into the roundhouse through the small door in the southeast corner. I usually entered there. That was the customary way to enter. There was a door near the desk, but it was never used to my knowledge. I followed the east wall to near the center where the desk was opposite. That was my usual way of going, and the way pursued by other employees. It was more direct. One trip I made the other way, going along the south side between the wall and pit 12, and thence on the west side in front of the pits to the desk, I stumbled over a bucket that somebody left along the south wall. There were tool-racks and closets there and sometimes tools lying there. The closets didn't give you so much room. The morning I was hurt I went along the east

wall. When I got near the center I turned to go towards the desk. I hadn't particularly noticed the steam. There was steam, but when I started towards the desk everything appeared all right. The light appeared all right. I thought I was right opposite the desk but the steam there confused me, and I stepped into one of those pits. The steam was extraordinary, more than I had ever contended with before. I had no difficulty before in distinguishing the pits. This morning it was foggy. The pits all looked like the floor. From where I walked I thought I was between the pits. It looked just the same as the floor, and I stepped into one of the pits. It was black just like the floor. I had been in the roundhouse a great many times before and knew the pits were there. I know the building was not well lighted. The night before it was dark when we went out. It wasn't well lighted when we went out. There were no rails or anything around the pits to keep employees from falling in."

On cross-examination, he testified substantially that there was plenty of room to walk between those pits and the side of the roundhouse, and that:

"I had carefully studied the location of them in respect to the rear of the roundhouse, and had been around the other way before, without going in the rear of the engines. In going around between pit 12 and the south wall of the house and thence across to the desk it was impossible to cross over the pits. Apparently it was not very dark at first. At best, I could find my way without difficulty. There were lights there, but I could not be positive of their exact location. I don't remember stopping in going from the entrance to the place where I fell into pit 6. I could see pit 12 right in front of the door as I came in. There is about the same space west of the pits as east of them. I never came in contact with any tools on the east side, though I have seen them lying on the floor in front of the locomotives on the west side."

H. J. McIntire was a boilermaker's helper, employed in the roundhouse, and was gathering up his tools preparatory to leaving the night shift when the accident occurred. He said that he and another employee "blew off" an engine between 4 and 6 o'clock of the morning of the accident; also:

"I began gathering up tools at 6:30 o'clock. I had a bunch of tools, going to the tool-rack, and came against Mr. Hopper, helping Mr. Wintermute out of the pits. The steam would make it dark in the roundhouse. There was a great amount at that end, not any more than ordinarily comes from blowing off an engine, but more than ordinary if you hadn't blown off one. There is more or less steam in the house all of the time. There were forty-eight lights provided for, four between each pit, one at each end and two in the center. There were nine lights burning, that morning. The rest would not burn. At 6:35 A. M. there were burning: one light in front and one in rear between the wall and pit 1; one light in front and one in rear between pits 2 and 3; one light in front and one in rear between pits 4 and 5; one light in front and one in rear between pits 5 and 6; and one light in rear between pits 8 and 9. It was very dark in the north portion of the building because of dense steam and I can't say as it was poor lights, because they had lights in the north end. There were more lights in the north end than in the south end. I don't know if the trainmen had any particular route, that is, coming from the train they get off the engine, they would come in the big doors if they were open, the ones they run the locomotives in and out. The O.-W. men usually come in by the northeast and southeast doors. The general run of them would come on the east side and right up to the desk between the pits. That is the way Mr. Wintermute testified he went."

On cross-examination he said:

"The engine was blown off prior to 6:30 on either stall 2 or 3, which would be in the north end. I would

say it was between 4 and 6 o'clock that we blew that engine off. It might have been 4 and it might have been 6 o'clock."

From the plats admitted in evidence it appears that the roundhouse is built to conform to segments of concentric circles, the smaller circle being the east side and entrance for engines, which are run in over the pits and headed towards the circumference of the larger circle. There are 12 pits, numbering from the north to the south side of the house. Besides the large doors which were closed by steel curtains sliding up and down, there was a small door near each corner of the building. The desk towards which plaintiff was going is located on the west side, next to the wall between pits 4 and 5. The lockers and tool-rack are situated in front of pits 7 to 11. The floor space in front of the pits on the west side was about 14 feet in width, and substantially the same on the east side in the rear of the engines. After he entered the small door near the southeast corner, pit 12 was immediately in front of the plaintiff. By turning to the left and going along the south wall between it and pit 12, he could have gone to the desk without crossing any pit, as stated in his evidence. Instead of doing so, he turned to the right, passed along the east wall until he came, as he thought, about opposite the desk, the location of which he distinguished by the light suspended over it, and turning in that direction, fell into pit 6. He admits having traversed before the course around by the south side and thence across in front or west of the pits, but claims that on one occasion in going that way he stumbled over a bucket, and that he had seen tools lying along in the space in front of the locomotives. He does not state or pretend, however, that any such obstacles were there at the time of

the accident. It is plain from his own testimony that he had the choice of going either way.

Recurring now to his charges of negligence, we find the first is that the defendant failed to maintain said roundhouse and that portion thereof which defendant was obliged to traverse on the way to the registry-stand in a properly illuminated condition, and that the same was dark. The evidence does not sustain this allegation, for the plaintiff was not obliged to travel the way he did. Nothing prevented him from entering either of the small doors and going around the pits instead of attempting to pass between them. As to the darkness, he said, "it was apparently not very dark at first," that he could find his way without difficulty, and that he could see pit 12 right in front of the door as he came in.

The second charge of negligence is that while he was in the roundhouse on the way to register, the defendant, through some of its careless servants, caused an engine to emit a large cloud of steam, by reason of which the building became so darkened it was impossible for him to see. On this subject, his own witness testifies that the steam was blown off from the engine between 4 and 6 o'clock of that morning, at least, considered the most favorably for the plaintiff, a half hour before he entered the building. He himself does not testify that the steam was blown off after he entered the roundhouse.

It is said in the third place that the defendant was remiss in its duty, and did not provide a safe place for the plaintiff to work, by not erecting guards around the pits. But the fact is, as stated by the plaintiff himself, that there was a safe place for him to walk in going to the desk. His own testimony was that there was a door in the northwest corner near

the desk, through which he could have entered, and that he could have gone around the pits by the south side and thence across on the west side, without crossing the pits. From the testimony in his behalf, we are driven to the conclusion that he certainly knew of the existence and situation of the pits. The evidence shows that the steam had been discharged at least half an hour before he entered the building. There was no evidence that any steam was discharged after he went in. All the steam there and its situation with reference to the pits was plainly visible before his eyes, and there was no change in that respect from the time of his entry until his fall. Plainly without being compelled to do so, but of his own free choice, he undertook to make his way through a cloud of steam between the pits. We thus have established all of the elements of knowledge and appreciation of danger, which are the ingredients of assumption of risk.

Discussing this subject in *Seaboard Air Line Ry. v. Horton*, 233 U. S. 492 (58 L. Ed. 1062, Ann. Cas. 1915B, 475, L. R. A. 1915C, 1, 34 Sup. Ct. Rep. 635), Mr. Justice PITNEY, speaking for the Supreme Court of the United States, said:

“Some employments are necessarily fraught with danger to the workman—danger that must be and is confronted in the line of his duty. Such dangers as are normally and necessarily incident to the occupation are presumably taken into the account in fixing the rate of wages. And a workman of mature years is taken to assume risks of this sort, whether he is actually aware of them or not. But risks of another sort, not naturally incident to the occupation, may arise out of the failure of the employer to exercise due care with respect to providing a safe place of work and suitable and safe appliances for the work. These the employee is not treated as assuming until he becomes aware of the defect or disrepair and of the risk arising from it,

unless defect and risk alike are so obvious that an ordinarily prudent person under the circumstances would have observed and appreciated them. These distinctions have been recognized and applied in numerous decisions of this court: *Choctaw, O. & G. R. Co. v. McDade*, 191 U. S. 64, 68 (48 L. Ed. 96, 24 Sup. Ct. Rep. 24); *Schlemmer v. Buffalo, R. & P. Ry. Co.*, 220 U. S. 590, 596 (55 L. Ed. 596, 31 Sup. Ct. Rep. 561); *Tex & Pac. Ry. Co. v. Harvey*, 228 U. S. 319, 321 (57 L. Ed. 852, 33 Sup. Ct. Rep. 518); *Gila Valley Ry. Co. v. Hall*, 232 U. S. 94, 102 (58 L. Ed. 521, 34 Sup. Ct. Rep. 229, see, also, Rose's U. S. Notes), and cases cited.

"When the employee does know of the defect, and appreciates the risk that is attributable to it, then if he continues in the employment, without objection, or without obtaining from the employer or his representative an assurance that the defect will be remedied, the employee assumes the risk, even though it arise out of the master's breach of duty. If, however, there be a promise of reparation, then during such time as may be reasonably required for its performance, or until the particular time specified for its performance, the employee relying upon the promise does not assume the risk, unless at least the danger be so imminent that no ordinarily prudent man under the circumstances would rely upon such promise."

In *Brundage v. Southern Pacific Co.*, 89 Or. 483 (174 Pac. 1139), Mr. JUSTICE JOHNS, writing the opinion, reviews the precedents at length, and the result of his investigation is thus summed up on this point by the following excerpt from the syllabus:

"Where a railroad telegraph inspector, having for more than thirty days used a speeder, and knowing that a tunnel was without lights, and that construction trains backed through such tunnel without lights, was killed while in the tunnel through collision with a construction train, the railroad is not liable; the inspector having assumed the risk."

In his concurring opinion in the Brundage case, Mr. Justice HARRIS uses this language:

"The decedent assumed both the risk of the work train running without a schedule and also the risk of the tunnel itself being unlighted. Framhein-assumed all the risks that were ordinarily incident to his employment, and also extraordinary risks which he knew, or ought to have known, and appreciated" citing *Galvin v. Brown & McCabe*, 53 Or. 598, 611 (101 Pac. 671).

Practically without exception the cases cited by the plaintiff show that the injured plaintiff was not informed of the danger by which he received his hurt. For instance, *Acres v. Frederick & Nelson*, 79 Wash. 402 (140 Pac. 370), was a case where the plaintiff had been hired only the day before for work in the defendant's warehouse. There were several passageways between piles of furniture stored there. An elevator was located near the center of the main floor. Ordinarily, when the elevator was either above or below that floor there were gates which prevented anyone from falling into the shaft. On this occasion the gates had been tied up, so that they presented no obstacle to anyone going there. The plaintiff had no knowledge of this condition, and approached the elevator shaft through one of the passageways, which was not well lighted, and on account of his ignorance of the raising of the gates, and that the elevator itself was away from that floor, he fell into the shaft, but he was held not to have assumed the risk of his employment, because he was not aware of the danger. *Pesin v. Jugovich*, 85 N. J. Law, 256 (88 Atl. 1101), is not in point, because the assumption of risk was expressly eliminated from that case, and it was decided solely on the question of contributory negligence. In *Faxen v. Butler*, 206 Mass. 500 (92 N. E. 707, 138 Am. St. Rep.

405, 19 Ann. Cas. 660), the plaintiff had rented a room opening upon a lighted hall in which there was a flight of steps, upon which her door opened. It was there held that she assumed the risk of using the hall thus lighted, but not the risk of its use when not lighted, when she had no knowledge that it was dark before entering it. Her door gave immediately upon the flight of steps, and, without knowledge that the light had been extinguished she stepped out and missed her footing on the stair. In *Dixon v. Swift*, 238 Ill. 62 (87 N. E. 59), it was held that, if the plaintiff's decedent had no knowledge of the removal of boards across the top of some bins where he was installing a line shaft, he did not assume the risk of going there. In *Letchworth v. Boston & Me. Ry.*, 220 Mass. 560 (108 N. E. 500), the plaintiff was ignorant of the removal of a foot-bridge over which all officers and employees of the defendant habitually passed, and hence was held not to have assumed the risk of passing that way. Besides this, assumption of risk in that case was not set up as a defense. In *Gregoric v. Percy-La Salle M. & P. Co.*, 52 Colo. 495 (122 Pac. 785, Ann. Cas. 1913E, 1030), the decedent did not know of the location or existence of the mine chute down which he fell, and the court said:

“He only assumed the risk of dangers which he knew existed, or which, by the exercise of reasonable care, he could have ascertained.”

In argument in his brief in the instant case the plaintiff's counsel says:

“It is not a case of the plaintiff going into a darkened building with knowledge of pitfalls and taking chances of being able to negotiate his mission with safety, but he had come into a building which when he entered was absolutely safe and remained so until the steam from the engine enveloped him and created a

condition in which he was unable to determine the location of the pits and avoid them."

A close analysis of the testimony does not sustain the conception of the environment thus quoted. The plaintiff was thoroughly familiar with the situation. He himself says that he had carefully studied the location of the pits with respect to the rear of the round-house. The evidence plainly shows that the steam had been blown off before he went into the building; and, granting that it darkened the interior, it is indeed a case of the plaintiff's going into a darkened building with knowledge of pitfalls and taking chances of being able to negotiate his mission with safety. Having a thorough knowledge of the situation, and volition to go where he chose, he must be held to have assumed the risk of going the way he did.

The judgment of the Circuit Court is affirmed.

AFFIRMED.

Argued at Pendleton October 25, 1920, reversed and remanded January 4, 1921.

PUGSLEY v. SMYTH.

(194 Pac. 686.)

Husband and Wife—Elements Constituting Alienation of Affections Stated.

1. The action for alienation of affections is based on loss of consortium, and loss of service or pecuniary loss is not a necessary element.

Husband and Wife—Defendant must have been Intentional and Controlling Cause of Alienation.

2. Defendant's conduct must have been the intentional cause and the controlling cause of the alienation of affections, although there may have been other contributing causes.

Husband and Wife—Cause of Action for Alienation not Dependent on Showing Adultery.

3. Physical separation of the spouses is not essential, and it is not necessary that plaintiff prove debauchment, though generally, in the absence of adultery, defendant is not liable unless acting maliciously.

1. On actual separation or abandonment as prerequisite to action for alienation of affections, see note in *Ann. Cas.* 1918A, 647.

Husband and Wife—In Action for Alienation Natural Expressions of Wife Showing State of Mind are Admissible, Though Involving Acts and Words of Defendant.

4. The declarations of the deserting wife, though made in the absence of defendant, are available to prove the state of the wife's affections, her motive, and the effect produced upon her by defendant's conduct, notwithstanding such declarations involve statements of acts done or words spoken by the defendant, but such declarations must not be mere narratives but natural expressions of the emotions showing her state of mind.

Husband and Wife—Wife's Admission to Husband of Past Adultery not Admissible in Alienation Suit.

5. In an action for alienation of wife's affections, the husband's testimony of her admission of past misconduct and adultery with defendant was inadmissible; the utterance not being a part of the act, nor made at or approximately before the alienation, so that it was a mere narrative of past events.

Witnesses—Wife's Admission of Adultery Made to Husband is Privileged.

6. In an action for alienating affections of plaintiff's wife, her communications to plaintiff admitting adultery with defendant were shielded by Section 733, subdivision 1, Or. L., relating to privileged communications between spouses.

Appeal and Error—No Presumption That Wife Consented to Revelation of Her Privileged Communications.

7. The ruling of the court in an alienation of affections suit in admitting privileged communications of plaintiff's wife cannot be supported on the theory that, there being no affirmative statement in the record showing that she objected to the revelation of her communications, it must be presumed that she consented, where all that was done or said at the trial appears in the record and no such consent appears therein.

Husband and Wife—Statement by Wife That Defendant Loved and Intended to Marry Her Admissible in Husband's Alienation Action.

8. In an alienation action, plaintiff's testimony that his wife said defendant had promised to provide her anything she wanted that money would buy, that he was going away to school, that she was going there, etc., was inadmissible as a narrative of fact, while another witness' testimony that plaintiff's wife said she was

5. On competency of one spouse to testify as to misconduct of other in action for alienation of affections, see note in 39 L. R. A. (N. S.) 317.

6. The question as to whether conversation between husband and wife tending to show affection or the contrary are privileged is discussed in a note in 2 L. R. A. (N. S.) 708.

8. On admissibility of statements or declarations of plaintiff's spouse concerning acts or conduct of defendant in action for alienation of affections, see note in 4 A. L. R. 497.

in love with defendant, who did not care for his own wife and intended to marry her, etc., was admissible as a natural expression of wife's emotion.

Trial—Requested Instructions to be Tested by Words Used, not by Words Meant to be Used.

9. In action for alienation of affections, requested instruction that "evidence of statements of wife of the injured spouse were received in this case and admitted in evidence for the purpose only of showing the feelings of the injured spouse," and not to establish the facts stated, *held* properly refused, declarations of the wife being inadmissible to prove the husband's feelings, although it may be assumed it was intended by the framer of the instruction to so word it as to advise the jury that the wife's declarations could only be considered as evidence of her feelings; yet the instruction must be tested by the words found in it.

Husband and Wife—Cautionary Instructions as to Wife's Declarations Desirable.

10. In an alienation of affections suit, since evidence of the alienating spouse's declarations is receivable only for a limited purpose, and cannot be considered as evidence that defendant really did the acts or uttered the words attributed to him by such declarations, the court should advise the jury of the limited purpose for which such declarations may be considered; for, in the absence of a cautionary instruction, jurors will naturally assume that such declarations may be treated as evidence that defendant actually did or said what the alienated spouse said he did or said.

Trial—Refusal of Instructions Covered by Others not Error.

11. It is not reversible error to refuse requested instructions which are accurate and concise statements of the law applicable, where such matters are substantially covered by other instructions.

Witnesses—Statute Held to Privilege All Communications, not Merely Confidential Ones—"Any Communications."

12. In Section 733, subdivision 1, Or. L., and Section 734, the words "any communications" do not mean "confidential communications," but that all communications between husband and wife are privileged unless express or implied consent to publication is given, or unless the privilege is lost by being brought within one of the specified Code exceptions, and such statutes apply to suits for alienation of affections.

From Harney: DALTON BIGGS, Judge.

In Banc.

Clifford D. Pugsley sued Fred W. Smyth for damages for alienating his wife's affections. A trial

resulted in a verdict and judgment for Pugsley. Smyth appealed.

One assignment of error is based upon the refusal of the trial court to direct a verdict for the defendant, and for that reason an extended statement of the evidence given at the trial becomes necessary:

The plaintiff and his wife were married in about the year 1909. There were two children; a daughter aged 10 years and a son aged 7 years.

The defendant and his "people" live at Diamond, in Harney County. During most of the period of the plaintiff's married life he has been employed by "the Smyth people," and according to the testimony of the plaintiff, he was so employed "off and on for, I think, about nine years." Both the plaintiff and his wife lived at "the Smyth place" when he was "employed by them." The plaintiff says that he and his wife lived happily together until the summer of 1919. Pugsley stated that "starting in the summer of 1919" he observed that his wife and the defendant "were going about a great deal together," and "were about together a great deal by themselves." Pugsley cites one time when at a dance Smyth "danced every other dance with her." In this connection it is appropriate to call attention to the testimony of Mrs. Bradburn, a sister of the plaintiff, who resides at Diamond and during portions of 1919 was employed "at the Smyth ranch." Mrs. Bradburn testified that—

In May "we was camped down below" the Smyth house "and my little nephew Norris came down to the camp and told me that his mother said he could stay a couple of hours to play with the children, the girls. I was on my way up to the ranch to send a letter. * * I went on in the front room [of the Smyth house]; supposed Nora [Mrs. Pugsley] was around. I played

a record on the graphophone; stayed there a little while, thinking she would come in. Pretty soon Fred [Smyth] came down the stairs. I asked him where Nora was. He said he didn't know, and I played another record and Nora hollered down to me from upstairs and told me to come on up, and she said, 'Why, I didn't know who that was playing'; and I went on up."

The plaintiff says that he did not become aware of any relationship between his wife and Smyth until the 13th or 14th of July, 1919, when he found in her pocket a note which Smyth had written to her. The plaintiff "left that night," but he afterwards returned and "tried to talk her into the notion of leaving the Smyths entirely and going away, * * and she finally consented to go. We was going up to Pendleton and work through harvest." The plaintiff and his wife then "came up to Burns," where they stopped "a couple of days" at the Levens Hotel. They did not go on to Pendleton, however, for the reason that Mrs. Pugsley refused to "go on any farther." In the language of the plaintiff: .

"She told me that she couldn't go away and leave him; she thought more of him than she did of me and I might as well just go on. * * She told me all of her plans. * * She explained to me how that she was going to get Fred. They was going away to live very happily. I asked her, I says, 'How are you going to pull anything like that with Lenora [Fred's wife]?' and she said Fred would have that fixed up. * * She told me that—to go ahead and get my divorce; * * that she didn't care anything for me any more."

The plaintiff also testified that his wife told him "that her relation with Fred Smyth had been improper," and that "the relations between her and Mr. Smyth were adulterous." It is clear from the transcript that the statement ascribed to Mrs. Pugsley to the effect that the relations with Smyth "had been im-

proper" was made by her, if at all, in July, while they were stopping in the Levens Hotel at Burns; but it is not entirely clear whether the other statement about their relations having been adulterous was made at this time in July or a month later when he returned to Burns from Prairie City in response to a telephonic request from his wife, although it is probably a fair inference to say that this statement was also made in July rather than in August.

The plaintiff then left Burns and "went on to Prairie City," and his wife "went back to Diamond." At the suggestion of Mrs. Pugsley the plaintiff took the son with him. After the plaintiff had been in Prairie City about a month his wife "phoned there and wanted me to fetch the boy back." The plaintiff thereupon went to Burns and met his wife there. Mrs. Pugsley was stopping in the Levens Hotel, and she and the plaintiff stayed together in the hotel overnight. While in her room at the hotel the plaintiff looked in her suitcase and found a photograph of Smyth and a note written by Smyth to Mrs. Pugsley as follows:

"Hello, there: Say I was coming up anyway. Yes; I'll sure be there. It might be kind of late for I have to kill a beef first see but I'll sure come to-night.

"Good-by."

Notwithstanding the disclosures made by his wife and the finding of the note and photograph, the plaintiff claims that he did "everything I could to get her to come back and live with me." As a result of this meeting at Burns the plaintiff and his wife "went back out to Diamond"; and he says that:

"He kept trying to get her in the notion of going away and getting out of the country, you see, and forgetting all about this thing. * * I kept coaxing her to go. Finally she said she would go away and see how we could get along."

After they had been in Diamond about a week, the husband and wife started for Idaho. They went to Crane by automobile and there stayed together overnight, and on the following day they boarded a train. They had proceeded on their way as far as Ontario and there they discussed their troubles with a lawyer, who advised them to forget the past and resume living together. They then "got a room" in a hotel. Pugsley states:

"When we got up in the room she just came right out and said that she wouldn't go any further with me; she was done; she couldn't forget this bird and she was going back with him."

The next day Mrs. Pugsley returned to the vicinity of Diamond, and shortly afterwards her husband also returned to the neighborhood of Diamond and there found employment "at the Diamond ranch." After going to this ranch the plaintiff made a trip "to Diamond," and as he was "coming back" he saw his wife and Smyth "in the lane together." At some time, not disclosed by the record, Pugsley left the Diamond ranch and went to Winnemucca, and subsequently he left Winnemucca and again went to Burns, arriving there about November 20, 1919. In the meantime his wife had gone to Burns. Upon reaching Burns on about November 20th, Pugsley found his wife sick, the children not feeling good, and they were "about broke." Pugsley supplied his wife and children with money until February 1, 1920, and then, to use his language, "she came out where I was working out to the island," and he also says that she lived with him at the island "right up till lately." The plaintiff declares that after his wife came to him at the island he "talked it over, but she says she don't like me like she used to or like she ought to."

The plaintiff and his wife were living together in Burns at the time of the trial, which occurred in April, 1920, and although the plaintiff stated that on account of the children he was anxious to effect a complete reconciliation, nevertheless, her feelings toward him were not as they were before 1919, and his feeling towards her "is not as good as it was a long time ago, hardly as good."

On redirect examination the plaintiff was asked: "Since you discovered her relationship with Mr. Smyth, has she at various times asked you to leave and go away by yourself?" And he answered thus: "Yes, sir." The next question and answer were as follows:

"Q. What would she say about Fred Smyth providing her with a home or with money or automobiles or things of that kind? A. Well, she said he promised to provide her with anything that she wanted, as far as money would buy. I believe she said one time he was going back down to Corvallis to go to school and she was going to go down there, and I don't know whether she would keep house for him or not, but he was going to buy him a new roadster and she would have all the use of that she wanted and they was going to be very happy."

Charles Fraser, whose wife is a sister of Mrs. Pugsley, testified that "during the first days of August [1919] some time" Mrs. Pugsley, who had been staying at his house "a couple or three days," asked him if he "cared if she had a caller one evening," and that on that evening Smyth called upon her. Lucille Fraser, the daughter of Charles Fraser, told about carrying notes from Mrs. Pugsley to Smyth and from Smyth to Mrs. Pugsley during the time in August when Mrs. Pugsley was staying at the Fraser home in Diamond.

Mrs. Bradburn, a portion of whose testimony has already been recounted, also testified that she recalled the time when the plaintiff and his wife left the Smyth place on account of the letter discovered by him; that she remembered that several days after leaving the Smyth place Mrs. Pugsley returned and was "a frequent visitor there at the Smyth ranch"; that one evening Mrs. Pugsley "came over to the ranch" and the witness saw Mrs. Pugsley in company with Smyth go by the witness' camp "towards the barn," and at the end of twenty or thirty minutes "they came back to the house." Mrs. Bradburn also testified that—

After Mrs. Pugsley "came back" she "told me that Fred was in love with her; didn't care for his wife any more; intended to marry her. They intended to get married as soon as he could get rid of Lenore, that is, as soon as—if she and my brother had decided to separate because they couldn't get along, and she didn't care for him any more, she loved Fred."

Mrs. Bradburn also testified that she talked with Mrs. Pugsley and Smyth, when all three were together, about their conduct and that she told Smyth that Mrs. Pugsley "would turn against him," and that thereupon Mrs. Pugsley exclaimed, "Fred, don't believe it. I will never turn against you"; and that she (the witness) "charged them with improper relations at that time" and "they didn't deny it."

The printed abstract specified fifteen assignments of error, but in his printed brief the defendant discusses only nine of them. Four of the assignments arose out of objections to testimony; three are based upon the refusal of the court to give instructions requested by the defendant; one is predicated upon the giving of an instruction over the objection of defendant; and the last grows out of the refusal of the court

to direct a verdict for the defendant. The first three assignments of error relate to testimony given by the plaintiff, and the fourth involves an answer of Mrs. Bradburn.

Assignment of error (1) arises out of the following question asked the plaintiff and answer given by him:

"Now at that time [meaning the time in July when the plaintiff and his wife were in the Levens Hotel at Burns] did she [Mrs. Pugsley] tell you that her relation with Fred Smyth had been improper? A. Yes, sir."

Assignment of error (2) relates to testimony given by the plaintiff after having been recalled as a witness in his own behalf. His attorney submitted the following question: "Mr. Pugsley, I believe I asked you this afternoon about a statement you made to your wife in the City of Burns at the time she left you. I did not ask you this question, I think: Did she tell you at that time that her relations and the relations between her and Mr. Smyth were adulterous?" The witness answered, "Yes, sir."

Assignment of error (3) is based upon the ruling which permitted the plaintiff to testify that his wife told him that Smyth—

"Promised to provide her with anything that she wanted, as far as money would buy. I believe she said one time that he was going back down to Corvallis to go to school and she was going to go down there, and I don't know whether she would keep house for him or not, but he was going to buy him a new roadster and she would have all the use of that she wanted and they was going to be very happy."

Assignment of error (4) questions the competency of the testimony given by Mrs. Bradburn when she stated that—

Mrs. Pugsley "told me that Fred was in love with her; didn't care for his wife any more; intended to

marry her. They intended to get married as soon as he could get rid of Lenore, that is, as soon as— if she and my brother had decided to separate because they couldn't get along, and she didn't care for him any more, she loved Fred."

Assignments which for convenience are here numbered respectively (5), (6), and (7), are predicated upon the refusal of the court to give the following three several requested instructions:

"Evidence of statements of the wife of the injured spouse were received in this case and admitted in evidence for the purpose only of showing the feelings of the injured spouse, and not for the purpose of establishing the facts therein stated.

"That there is no ground for an action of this character where a spouse voluntarily gives his or her affections to another; the latter doing nothing wrongful to win such affections.

"To support an action for alienating a wife's affections, it must be established that the defendant is the enticer. Mere proof of abandonment and that the wife maintains improper relations with the defendant is not sufficient to bring in a verdict for damages."

Another assignment, which we shall designate as (8), involves the following instruction given to the jury:

"It is not necessary, however, that the actions of the defendant shall be the sole and only cause of the alienation of the wife's affections. If it is a substantial and moving cause, without which the affections would not have been alienated, then the defendant is responsible in damages for his conduct in that matter."

REVERSED AND REMANDED.

For appellant there was a brief over the names of *Mr. J. W. McCulloch*, *Messrs. Biggs & Biggs* and *Mr. F. E. Swope*, with an oral argument by *Mr. McCulloch*.

For respondent there was a brief with oral arguments by *Mr. P. J. Gallagher* and *Mr. W. H. Brooke*.

HARRIS, J.—1-3. Each spouse is entitled to the conjugal society, affections, and assistance of the other. A third person who intentionally alienates or entices one spouse from the other is generally liable to the latter. Loss of service is not the basis of the right of action, for pecuniary loss is not a necessary element; but the right to recover is based upon loss of consortium. However, loss of consortium does not alone create a right of action; nor is a right of action brought into existence by the added fact that a spouse has voluntarily transferred his or her affections to a third person, the latter doing nothing wrongful to win them. Stated broadly, the rule is that the third person's conduct must have been the intentional cause of the loss suffered by the injured spouse. The conduct of the third person need not be the sole cause, but it is sufficient if the third person's conduct was the controlling cause which produced the estrangement, although there may have been other contributing causes. It is not necessary for the husband to prove the debauchment of his wife, nor is it essential that there shall be a physical separation of the spouses. If, however, the element of seduction or adultery is not present, the general rule is that a third person is not liable for alienation of affections unless he acted maliciously or from improper motives implying malice in law.

In order to ascertain whether a right is assertable and enforceable by the husband, and whether a corresponding liability has been incurred by the defendant, there must be an examination of the conduct of *Mrs. Pugsley* and the relations between her and her hus-

band, and also an examination of the conduct of the defendant and his relations with Mrs. Pugsley, so that it can be finally determined whether there is a causal connection between the conduct of Smyth and the mental state and conduct of Mrs. Pugsley, and then, if there is, whether the conduct of the one is the controlling cause and that of the other is the effect.

Not much difficulty is likely to be encountered when the inquiry relates directly to acts done or words uttered by the defendant. Ordinarily an investigation will be free from controversy, both as to the governing rule and also as to the application of the rule, where the inquiry relates directly to acts done by the alienated spouse, or even when the inquiry is broadened and includes the declarations of the deserting spouse directly asserting the existence or loss of affection; but dispute usually begins the moment any attempt is made to inquire about declarations made by the deserting spouse, out of the presence of the defendant, concerning acts done or words spoken by the defendant; and it is apropos to add that this resultant contention arises not so much from differences of opinion about the governing rule of law as from the difficulty experienced in applying the rule, for frequently, as is well illustrated by the reported precedents, different minds will not always agree that a given declaration is within or without an agreed rule. In other words, even in those jurisdictions where declarations of the deserting spouse about the acts and utterances of the defendant may in certain circumstances, even though made in the absence of the defendant, be competent, there will be room for debate concerning the applicability of the rule.

A feeling or emotion, such as joy, fear, hatred, affection, is only a mental element—a frame of mind.

It is not a substantive thing like a stick or a stone. Its size cannot, like a box, be measured by a yardstick. Its quantity cannot, like cereals, be measured by a bushel. Its presence, however, may be known and its degree evidenced, not only by gestures, facial expressions, and general physical conduct, but also by spoken words. Wordless conduct may be indicative of a condition of mind, and so, too, verbal utterances, even though not employed assertively, may indirectly indicate a condition of mind. The doctrine which sanctions the admission of verbal utterances constitutes an exception to the hearsay rule rather than a violation of it. The exception arises out of the ultimate fact, which is disclosed in the final analysis, that the utterance is in truth a natural and spontaneous verbal manifestation of an emotion, just as a facial expression or a gesture is the wordless manifestation of an emotion; and it matters not whether we call the vocal utterance a verbal act or a part of the *res gestae* or original evidence, for it is within the knowledge of all persons that a vocal utterance may be indicative of the feeling that inspired it just as a suddenly flushed cheek may be indicative of shame or surprise, or just as shattered nerves or trembling hands or a whitened face may be the natural and uncontrollable manifestations of fear: *State v. Farnum*, 82 Or. 211, 249 (161 Pac. 417, Ann. Cas. 1918A, 318). When, therefore, the state of a person's mind is the subject of inquiry, it is oftentimes competent to consider verbal utterances made by that person: 3 Wigmore on Evidence, §§ 1715 and 1730.

4. In cases brought to recover damages for the alienation of the affections of the spouse, the state of the affections of the deserting wife, the effect produced upon her mind by the conduct of the defendant,

and her motive or motives become material; and pursuant to the doctrine which permits a verbal utterance to be considered, like wordless conduct, as indirect evidence of the emotion which inspired it, the general rule is that declarations of the deserting wife, though made in the absence of the defendant, are available as evidence in behalf of the injured husband to prove the state of the affections of the alienated wife, her motive, and the effect produced upon her mind by the conduct of the defendant, notwithstanding such declarations involve statements of acts done or words spoken by the defendant. This is the general rule established by the authority of judicial precedents. There are a comparatively few jurisdictions in which the rule is rejected. There are some reported decisions which, when read superficially, might be thought to be repudiations of the rule; and yet, in most instances when the reasoning of those decisions is closely examined, it will appear that the rule itself is recognized and approved, but its applicability to the facts denied. At any rate, in most jurisdictions the rule is as already stated, and it has become *stare decisis* in this state: *Saxton v. Barber*, 71 Or. 230, 239 (139 Pac. 334); *Schneider v. Tapfer*, 92 Or. 520, 526 (180 Pac. 107); *Cripe v. Cripe*, 170 Cal. 91 (148 Pac. 520); *Hardwick v. Hardwick*, 130 Iowa, 230 (106 N. W. 639); *Hillers v. Taylor*, 116 Md. 165 (81 Atl. 286); *Moir v. Moir*, 181 Iowa, 1005 (165 N. W. 221); *Melcher v. Melcher*, 102 Neb. 790 (169 N. W. 720, 4 A. L. R. 492); *Nevins v. Nevins*, 68 Kan. 410 (75 Pac. 492); *Rudd v. Rounds*, 64 Vt. 432 (25 Atl. 438); *Williams v. Williams*, 20 Colo. 51 (37 Pac. 614); *Gilbreath v. Gilbreath*, 42 Colo. 5 (94 Pac. 23); *Warren v. Graham*, 174 Iowa, 162 (156 N. W. 323); *Rose v. Mitchell*, 21 R. I. 270 (43 Atl. 67); *Jones v.*

Jones, 96 Wash. 172 (164 Pac. 757); *Edgell v. Francis*, 66 Mich. 303 (33 N. W. 501); *McGowan v. Armour*, 160 C. C. A. 576 (248 Fed. 676); *Hanor v. Housel*, 128 App. Div. 801 (113 N. Y. Supp. 163); 13 R. C. L. 1478; 3 Elliott on Evidence, § 1648.

There are, of course, limitations and restrictions upon the rule. The reason of the rule naturally suggests the limitations upon the rule. If the utterance is nothing but a recital or narrative of what has been done or said, and is not the spontaneous and natural manifestation of the then existing emotion which inspired and produced it, then it does not come within the reason of the rule and is not admissible. It may be that in a given conversation between the husband and his deserting wife she may make many declarations; and while some of these declarations may be natural expressions of emotions, yet the others may be pure narratives of acts done and words spoken, and hence not admissible.

Unless the verbal utterance of the deserting spouse can be said to have been a vocal manifestation of the then existing state of her mind, it is pure hearsay if it involves a statement of a declaration made by the defendant, and on that account is not admissible. It is not enough to say that a declaration made by the wife concerning acts or utterances by the defendant are accompanied by other declarations which reflect her then existing emotions, but the kind of declarations now under discussion must themselves come within the reason of the rule which makes them competent. It may be that a given declaration is meaningless and without significance unless viewed in the light of an accompanying declaration, or it may be that the latter is without significance unless considered in connection with the former. Each case is

dependent largely upon its own circumstances, and, as has been frequently remarked, it is sometimes difficult to determine whether a given declaration is included or excluded by the rule: *Westlake v. Westlake*, 34 Ohio St. 621 (32 Am. Rep. 397); *Cochran v. Cochran*, 196 N. Y. 86 (89 N. E. 470, 17 Ann. Cas. 782, 24 L. R. A. (N. S.) 160); *Preston v. Bowers*, 13 Ohio St. 1 (82 Am. Dec. 430); *Scott v. O'Brien*, 129 Ky. 1 (110 S. W. 262, 130 Am. St. Rep. 419, 16 L. R. A. (N. S.) 742); *Brison v. McKellop*, 41 Okl. 374 (138 Pac. 154); 1 Ency. of Ev. 759.

5. If an act of the deserting spouse is the subject of inquiry, a declaration explaining and characterizing that act becomes admissible on the theory that the utterance is a part of the act; as, for example, when the deserting wife or husband takes her or his final departure, declarations made at the time may become competent: *Schneider v. Tapfer*, 92 Or. 520, 529 (180 Pac. 107).

Admissible declarations are usually further limited to those which have been made at or approximately before the alienation (*Schneider v. Tapfer*, 92 Or. 520, 526 [180 Pac. 107]); and yet, since "the mischief is a continuing one, going on from day to day, and becoming worse with the delay," the inquiry may properly cover the whole period of alienation (*Edgell v. Francis*, 66 Mich. 303 [33 N. W. 501]).

6. The testimony embraced in assignments of error (1) and (2) are incompetent for two reasons. Each of the two declarations was a segregated recital of a previously consummated act or acts, a past event, and they are not, in the circumstances disclosed by the record, such vocal manifestations of the mental state as are admissible. Moreover, whether the words "any communication" in section 733, subdivision (1),

Or. L., are construed to mean "all" communications or only "confidential" communications, nevertheless, in either event, both declarations were manifestly privileged communications, and as such were completely shielded by the statute: *Harper v. Harper*, 252 Fed. 39 (164 C. C. A. 151); *Sanborn v. Gale*, 162 Mass. 412 (38 N. E. 710, 26 L. R. A. 864); *Kohlhoss v. Mobley*, 102 Md. 199 (62 Atl. 236, 5 Ann. Cas. 865); *Westlake v. Westlake*, 34 Ohio St. 621 (32 Am. Rep. 397); *Millspaugh v. Potter*, 62 App. Div. 521 (71 N. Y. Supp. 134); *Hanor v. Housel*, 128 App. Div. 801 (113 N. Y. Supp. 163); *Phelps v. Bergers*, 92 Neb. 851 (139 N. W. 632); *Sanders v. Burnham*, 91 Vt. 481 (100 Atl. 905); 3 Ency. of Ev. 787.

7. The plaintiff argues that there is no affirmative statement in the record showing that Mrs. Pugsley objected to the revelation of her communications, and that, on the authority of *Long v. Lander*, 10 Or. 175, it must be presumed that she consented, and that therefore the ruling of the court was free from error. The appeal in *Long v. Lander* was presented on an abbreviated bill of exceptions in conformity with the old practice. In the instant case there is before us both a short bill of exceptions and also a record of the entire trial showing "all the evidence" and "all of the proceedings had at the trial": See *Malloy v. Marshall-Wells Hardware Co.*, 90 Or. 303 (173 Pac. 267, 175 Pac. 659, 176 Pac. 589). Mrs. Pugsley was not a witness for either party. The defendant declined to offer any evidence, but permitted the cause to be submitted to the jury on the evidence offered in behalf of the plaintiff. Since all that was done or said at the trial appears in the record, and it does not appear that Mrs. Pugsley consented, the presumption invoked by the plaintiff is not available to him for the

reason that it is without a foundation upon which to rest: 10 Ency. of Ev. 200.

8. The testimony in assignment of error (3) does not come within the rule and is not competent.

The testimony of Mrs. Bradburn embraced in assignment of error (4), in our view, is within the rule and is competent.

9, 10. The court properly refused to give the requested instruction found in assignment of error (5). The plaintiff is the "injured spouse," and is referred to as such in the first part of the requested instruction. The declarations of the wife were not admissible to prove the feelings of the husband, and although it may be assumed that the framer of the requested instruction intended so to word it as to advise the jury that the declarations of the wife could only be considered as evidence of her feelings, nevertheless the requested instruction must be tested by the words actually found in it. However, it is appropriate to add that, since evidence of the alienated spouse's declarations is receivable only for a limited purpose and cannot be considered as evidence that the defendant really did the acts or uttered the words attributed to him, the court should advise the jury of the limited purpose for which such evidence may be considered; for, in the absence of a cautionary instruction, jurors will naturally and almost invariably assume that such declarations may be treated as evidence that the defendant actually did or said what the deserting spouse said he did or said: *Schneider v. Tapfer*, 92 Or. 520, 529 (180 Pac. 107); *Derham v. Derham*, 125 Mich. 109 (83 N. W. 1005); *Hardwick v. Hardwick*, 130 Iowa, 230 (106 N. W. 639); *Hillers v. Taylor*, 116 Md. 165 (81 Atl. 286); *Moir v. Moir*, 181 Iowa, 1005 (165 N. W. 221); *Melcher v. Melcher*, 102 Neb. 790 (169 N. W. 720, 4 A. L. R. 492); *Welty*

v. *Sparks*, 179 Iowa, 1390 (162 N. W. 614); *Williams v. Williams*, 20 Colo. 51 (37 Pac. 614).

11. Reversible error did not result from the failure to give the requested instructions appearing in assignments of error (6) and (7), although they are accurate and concise statements of the law as it is declared in *Saxton v. Barber*, 71 Or. 230, 236 (139 Pac. 334), and in *Scott v. O'Brien*, 129 Ky. 1, 7 (110 S. W. 260, 130 Am. St. Rep. 419, 16 L. R. A. (N. S.) 742). See, also, *Keen v. Keen*, 49 Or. 362, 366 (90 Pac. 147, 14 Ann. Cas. 45, 10 L. R. A. (N. S.) 504). The advice contained in these two requests was substantially given in the charge as delivered to the jury.

The defendant argues that the instruction embraced in assignment of error (8) is defective because it fails to state that "the appellant's actions must have been intentional." The general rule is, as already pointed out, that the defendant must have intentionally caused the alienation of the wife's affections: *Saxton v. Barber*, 71 Or. 230, 236 (139 Pac. 334); *Nevins v. Nevins*, 68 Kan. 410, 415 (75 Pac. 492); *Keen v. Keen*, 49 Or. 362, 366 (90 Pac. 147, 14 Ann. Cas. 45, 10 L. R. A. (N. S.) 504); *Dodge v. Rush*, 28 App. Cas. (D. C.) 149 (8 Ann. Cas. 671). Although the general charge given by the court was probably sufficient to cure the alleged defect in the instruction embraced by assignment of error (8), nevertheless, in this connection it is appropriate to suggest that upon a retrial the element of intention can be made clearer to the jury.

It is not necessary to discuss at length the assignment of error which questions the refusal to direct a verdict for the defendant, for, after excluding the incompetent declarations of the wife, there yet remains in the record sufficient evidence, if believed by a jury, to support a verdict.

12. Since there must be a new trial, and in view of the defendant's contention that some of the communications made by Mrs. Pugsley to the plaintiff were privileged communications within the meaning of Section 733, Or. L., it becomes proper to determine the extent of the statute when applied to the marital relation. Section 733, subdivision 1, Or. L., reads as follows:

"A husband shall not be examined for or against his wife without her consent, nor a wife for or against her husband without his consent; nor can either, during the marriage or afterwards, be, without the consent of the other, examined as to any communication made by one to the other during the marriage; but the exception does not apply to a civil action, suit, or proceeding, by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other."

The statute deals, not only with the qualification of one spouse as a witness for or against the other, but also with the privilege with which the law shields communications made by one to the other. The husband was of course a competent witness, and, moreover, the wife becomes a qualified witness when the husband testifies in his own behalf, for by the express terms of Section 734, L. O. L.:

"That is to be deemed a consent to the examination also of a wife, * * within the meaning of subdivision 1 * * of the last section."

However, we are not now interested in the subject of the qualification of one spouse to testify for or against the other; but the present inquiry is directed solely to that portion of the statute which treats of communications made by one spouse to the other.

What does the statute mean? Are the words "any communication" to be given their primary and literal

meaning, so as to embrace every communication, or are they to be narrowed and limited by an implied limitation so as to include only confidential communications? No attempt has thus far been made by this court to determine the exact limits of the words "any communication," although there is an intimation in *State v. Luper*, 49 Or. 605, 607 (91 Pac. 444), that the statute affords material for debate as to whether the words "any communication" mean "all" or only "confidential" communications. The intention of the legislature is of course an important element, and, consequently, courts should and do seek to ascertain the intention of the lawmakers. Indeed, the influence of the element of intention is so pronounced that a doing, though within the letter of the statute, is sometimes construed to be beyond the grasp of the statute, because not within its spirit; and, on the other hand, conduct, though not within the strict letter of the statute, may nevertheless be held to be within the embrace of the statute because clearly within its spirit. Since we may with legal propriety, for the purpose of aiding in discovering the intention of the legislature, inquire about the conditions existing at the time of the enactment of our statute, we shall direct attention to the state of the law at the time of the enactment of Section 733, Or. L., and then we may with like legal propriety, for the purpose of securing additional assistance in construing the language of our own statute, prosecute our inquiry still further by looking into the statutes which have been enacted by most of the states in the United States.

The common law from an early date privileged communications between husband and wife: 4 Wigmore on Evidence, § 2333. Notwithstanding its early appearance and recognition, there was even after the lapse of two centuries some question whether the common law

extended the privilege to communications which in their nature did not seem to be confidential, or whether the privilege was limited to confidential communications; but in 1842, it has been said, it was finally determined in England that the privilege extended to all communications between husband and wife, although on subjects not confidential in their nature: *O'Connor v. Majoribanks*, 4 Man. & G. 228; *Dexter v. Booth*, 2 Allen (Mass.), 559; *Leppla v. Minnesota Tribune Co.*, 35 Minn. 310 (29 N. W. 127); 6 Ency. of Ev. 900. It has also been stated by some American courts, speaking years after the decision in *O'Connor v. Majoribanks*, that the common-law courts were not agreed as to the extent of the privilege: *Sexton v. Sexton*, 129 Iowa, 487 (105 N. W. 314, 2 L. R. A. (N. S.) 708). Other courts in this country have declared, long after the date of the English decision, that the privilege at common law did not extend to communications which were not in their nature confidential: *People v. Mullings*, 83 Cal. 138 (23 Pac. 229, 17 Am. St. Rep. 223). Other precedents illustrate the inability of American judges to agree upon the extent of the common-law rule: *Ex parte Beville*, 58 Fla. 170 (50 South. 685, 19 Ann. Cas. 48, 27 L. R. A. (N. S.) 273). Whether we say that the extent of the common-law rule was settled, so as to include all communications, by the decision rendered in *O'Connor v. Majoribanks* in 1842, a time when but few, if any, American states had enacted statutes upon the subject, or whether we say that the rule embraced only confidential communications, or whether we say that the common-law courts never did agree, nevertheless, in either event, the fact that the extent of the rule was a subject for debate and discussion as late as 1842, and even later, as already pointed out, must be treated as one of much importance when taken in connection with the

fact that Section 733, Or. L., was adopted as a part of our Civil Code in 1862. There is yet another circumstance which is worth noting. The territorial Code, which was adopted by the legislative assembly at the session commencing December 5, 1853, contains the following provision:

“A husband shall not be examined for or against his wife, nor a wife for or against her husband; nor can either, during marriage or afterwards, be, without the consent of the other, examined as to any communication made by one to the other during marriage. But this exception shall not apply to a civil action or proceeding by one against the other; nor to a criminal action or proceeding for a crime committed by one against the other”: Statutes of Oregon 1853, p. 111, § 7, subd. 1.

Upon comparing the Code of 1862 with that of 1853, it will be seen that the clause relating to communications between husband and wife is exactly the same in both Codes, except that in the Code of 1853 the word “the” does not appear before the word “marriage.” It will be also observed that, although not worded alike, the exceptions are the same in both cases.

Nearly every state in the Union has enacted legislation concerning the competency of one spouse to testify for or against the other, and so, too, nearly every state in the Union has adopted a statute concerning the privilege attached to communications made by one spouse to the other. In most, but not in all, jurisdictions the same statute covers both the qualification to testify as a witness and also the privilege accorded to a communication. Except in those states which have been admitted to the Union within the last 40 years, most of the legislation was enacted during the middle third of the 1800's, and a large portion of it was adopted near the end of that period.

Although some of the states have statutes in substance alike, and others have enactments which are alike in both thought and phrasing, still there are to be found among the many statutes material differences, not only in the language employed to define the privilege, but also in the wording used to express the exceptions, when any are specified.

In some of the states, as in New York, North Carolina, Pennsylvania, New Jersey, and Texas, the privilege is expressly limited to "confidential" communications: 5 Birdseye (C. & G.) Consolidated Laws of New York (Penal Law), § 2445; 1 Pell's Revisal of 1908 (N. C.), § 1636; 4 Purdon's Digest (13 ed., Pennsylvania), p. 5163, § 14; 2 Compiled Statutes of New Jersey, p. 2222, § 5; 3 Texas Civil Statutes (1914), Art. 3689.

There are other statutes having legislation substantially like that of New York, although differently phrased, as in New Hampshire, where neither the husband nor the wife shall "be allowed in any case to testify as to any matter which in the opinion of the court would lead to a violation of marital confidence": Public Statutes and Session Laws of New Hampshire in force January 1, 1901, Chap. 224, § 20. In Tennessee it is provided that neither "shall testify as to any matter that occurred between them by virtue or in consequence of the marital relation": Shannon's Code, §§ 5596 and 5597; *McCormick v. State*, 135 Tenn. 218 (186 S. W. 95, L. R. A. 1916F, 382). When a statute in terms confines the privilege to confidential communications, there can be no room for debate about the extent of the privilege; and, consequently, precedents dealing with statutes like that of New York can afford but little assistance when construing an enactment like Section 733, Or. L.

In some jurisdictions the limit of the privilege is expressed by the word "private," as in Massachusetts, where "neither husband nor wife shall testify as to private conversations with each other": 2 Revised Laws of Massachusetts (1902), Chap. 175, § 20, subd. 1. In Wisconsin neither spouse shall without the consent of the other "be permitted to disclose any private communication * * when such private communication is privileged. Such private communication shall be privileged in all except the following cases * * ": Wisconsin Statutes (1917), § 4072.

In a few states the single word "communication," unaccompanied by any qualifying word, is employed to designate the extent of the privilege, as in Georgia, where "communications between husband and wife" are "excluded from public policy," and though the husband is a competent witness in a suit for divorce, he "cannot testify to facts derived by reason of marital relations," and the wife, though a competent witness, when the husband is a party, "cannot give evidence as to facts required from marriage relation": 5 Park's Ann. Code of Georgia (1914), § 5785. In Indiana it is declared that neither the husband nor the wife shall be a competent witness "as to communications made to each other": 1 Burns' Ann. Indiana Statutes (Revision of 1914), § 520, subd. 6. When dealing with statutes like that of Georgia, there are strong reasons for saying that the privilege is limited to confidential communications: *Toole v. Toole*, 107 Ga. 472 (33 S. E. 686). Statutes like that of Indiana can with much more reason be held to include only confidential communications than can those where the word "any" is employed.

In most of the states, as in Oregon, "any communication" are the words found in the statute: Revised Statutes of Arizona (1913), Civil Code, § 1677, subd.

3; Digest of the Statutes of Arkansas (1916), § 3406, subd. 3; Code of Civil Procedure (California), § 1881. See, also, amendatory act of 1917 found in statutes and amendments to the Code of California (1917), Extra Session 1916, p. 954; 2 Mills Ann. Statutes of Colorado (1912), § 8072; 2 Idaho Compiled Statutes (1919), § 7937; Compiled Code of Iowa (1919), § 7314; 3 Compiled Laws of Michigan 1915 (12555), § 67; General Statutes of Minnesota (1913), § 8375; 2 Revised Codes of Montana (1907), § 7892; New Mexico Statutes, Ann. Code (1915), § 2174; 2 Compiled Laws of North Dakota (1913), § 7871; 5 Page & Adams Ann. Ohio General Code, § 11494; 2 Revised Laws of Oklahoma (1910), § 5050; General Laws of Rhode Island (1909), p. 1033, Chap. 292, § 39; 2 Criminal Code of South Carolina (1912), Chap. VI, § 91; 2 Revised Laws of Nevada (1912), § 5424; 1 South Dakota Revised Code (1919), § 2717; Revised Statutes of Nebraska (1913), § 7893; 2 West Virginia Code, § 2662; Carroll's Kentucky Codes (6 ed.) (1919), § 606 of the Civil Code; 2 Virginia Code Ann. (1904), § 3346-a, subd. 3; Revised Statutes of Utah (1898), § 3414; 2 Ballinger's Ann. Codes and Statutes of Washington, § 5994. In Illinois the language of the statute is "any admissions or conversations" (vol. 3, Illinois Ann. Statutes (1913), § 5522); and in Missouri the words are "any admission or conversations" (2 Revised Statutes of Missouri (1909), § 6359). Although twenty-three states besides Oregon have statutes employing the words "any communication," and two others use the possibly equivalent words "any admissions or conversations," it does not necessarily follow from the coincidence in that one particular that all these states furnish judicial precedents which can be logically applied to our statute. There are differences in thought and phrasing which

in some respects produce marked differences in substance rather than merely in form, and therefore every judicial decision rendered in a state having a statute must be read in the light of the language found in that statute. A few of the states have statutes so nearly like our own upon the subject of communications between husband and wife that for all practical purposes each may be said to be identical with the other; and yet, if with these few states having statutes identically the same as ours we also include the states having statutes merely similar to ours, it will be found that only twelve states, including Arizona, California, Colorado, Idaho, Michigan, Minnesota, Montana, North Dakota, South Dakota, Nevada, Utah, and Washington can be so classified. Even among these twelve states different exceptions to the rule of privilege are specified, notably in the states of Arizona, California, Nevada, and South Dakota, where actions for alienation of affections are excluded from the operation of the privilege. In this connection it should be added that California did not except cases for the alienation of affections until 1917, and it may be here further stated that in Wyoming in no case shall the husband or wife be a witness against the other except in certain cases among which are cases for the alienation of the other's affections, and husband or wife shall not, testify "except as provided in Section 4536": Wyoming Comp. Statutes (1910), §§ 4536 and 4537. In the remaining thirteen of the twenty-five states which, like Oregon, use the words "any communication" or their equivalent, the characterizing differences are more marked. The specified exceptions are sometimes radically different, not only in substance but in phraseology. In some of the statutes the language is so phrased as to express an absolute disqualification

rather than a mere privilege capable of being waived; *Robinson v. Robinson*, 22 R. I. 121 (46 Atl. 455, 84 Am. St. Rep. 832). In Oregon and in the twelve states which have statutes either identical with or similar to ours, there is an express recognition of the right to waive the privilege accorded to communications, for the language of these statutes is to the effect that one cannot be, "without the consent of the other," examined as to any communication; but in approximately half of the states using the words "any communication" the statute is silent upon the subject of waiver. This distinguishing characteristic is pointed out and commented upon in *Luick v. Arends*, 21 N. D. 614, 641 (132 N. W. 353), when discussing the decision rendered in *Sexton v. Sexton*, 129 Iowa, 487 (105 N. W. 314, 2 L. R. A. (N. S.) 708), where the Supreme Court of Iowa held that the words "any communication" did not prohibit the one spouse from revealing, in an action for alienation of affections, communications made by the other spouse.

The words "any communication" or their equivalent "any conversation" have been given their natural and primary signification and construed to mean "all" communications, in California, Colorado, Illinois, Rhode Island and Virginia: *People v. Mullings*, 83 Cal. 138 (23 Pac. 229, 17 Am. St. Rep. 223); *Park v. Park*, 40 Colo. 354, 360 (91 Pac. 830); *Reeves v. Herr*, 59 Ill. 81, 84; *Mueller v. Knollenberg*, 161 Ill. App. 107; *Donnan v. Donnan*, 236 Ill. 341, 345 (86 N. E. 279); *Campbell v. Chace*, 12 R. I. 333; *Wilke's Admr. v. Wilkes*, 115 Va. 886, 892 (80 S. E. 745). See, also, *Hoyt v. Davis*, 21 Mo. App. 235; *Waddle v. McWilliams*, 21 Mo. App. 298; *Holman v. Bachus*, 73 Mo. 49. At this point in the discussion it is appropriate to mention the fact that when the Code of Virginia was

revised in 1919, the statute was changed so that neither spouse shall without the consent of the other be examined in any case "as to any communication privately made": Code of Virginia (1919), § 6212. A contrary conclusion has been reached in Iowa, Michigan, Ohio, Utah, and Washington, for in those states the words "any communication" have been construed to include only communications which in their nature seem to be confidential: *Sexton v. Sexton*, 129 Iowa, 487 (105 N. W. 314, 2 L. R. A. (N. S.) 708); *Thayer v. Thayer*, 22 Detroit Legal News, 789 (188 Mich. 261, 154 N. W. 32); *Holtz v. Dick*, 42 Ohio St. 23 (51 Am. Rep. 791); *In re Van Alstine's Estate*, 26 Utah, 193 (72 Pac. 942); *Sackman v. Thomas*, 24 Wash. 660 (64 Pac. 819, 827). See, also, *Higham v. Vanosdol*, 101 Ind. 160, 162.

M. P. Deady, A. C. Gibbs, and J. K. Kelly were the Code commissioners who prepared our Civil Code which was adopted in 1862. The territorial Code, which became effective on May 1, 1854, was prepared by James K. Kelly, Ruben P. Boise, and Daniel R. Bigelow. The men who prepared these two Codes were learned members of the legal profession, and indeed some of them were pre-eminent on the bench and at the bar, and therefore we may safely assume that both commissions were fully aware of the uncertainty that had so long existed and of the prolonged debate about whether the common-law rule included all communications or only confidential communications. Assuming then that the Code commissioners were fully informed about the history of the common-law rule, the conclusion is inevitable that they used the word "any" deliberately and advisedly and for the purpose of avoiding uncertainty, and that by so

using the word "any" they intended to embrace all communications. Had it been their purpose to limit the privilege to communications dealing with confidential matters, they could have made that purpose plain by using the word "confidential" instead of the word "any." Looking at our statute in the light of its origin, and remembering that there had been previous uncertainty and debate as to the extent of the common-law rule, and recollecting, too, that the question had not been so conclusively settled as to preclude further doubt and controversy, it is a fair conclusion to say that the Code commissioners intended to adopt the rule which had been previously announced in *O'Connor v. Majoribanks*, and that they deliberately chose the word "any" as the word to express their intention. That the word "any" is an adequate term with which to express the idea of "every" cannot be denied; and, indeed, no other meaning can be given to the word, unless we say that it is qualified by some other word impliedly, though not expressly, accompanying it.

It is impossible to say that the word "any" means only "confidential" communications, unless the word "confidential" is expressly or impliedly written into the statute. The lawmakers did not expressly write the word "confidential" into the statute, and the evidence furnished by the surroundings when the statute was enacted, as well as the evidence contained within the language of the statute itself, argues strongly against the implied insertion of the word "confidential." After first privileging "any communication," the statute proceeds to specify the exceptions to the privilege; and by expressly naming the exceptions, the lawmakers have impliedly excluded all other exceptions: *Watkins v. Lord*, 31 Idaho, 352, 356 (171 Pac. 1133). Our statute does not specify actions for the

alienation of affections as one of the exceptions. As already stated, some of the statutes in which the words "any communication" are used acknowledge that those words are comprehensive and all including by expressly declaring that the words shall not operate in actions brought by one spouse for the alienation of the affections of the other spouse.

Attention has already been directed to the fact that some statutes do and others do not recognize the right to waive the privilege. Our statute expressly recognizes the right of waiver. One spouse may consent that the other may reveal a communication. Consent may be expressed or implied. A spouse may in terms give his or her consent to the publication of a communication. Even though a spouse does not at any time expressly consent to publication, nevertheless a communication may be such as to carry with it by plain or necessary implication, consent to publication: *Leppla v. Minnesota Tribune Co.*, 35 Minn. 310 (29 N. W. 127); *Newstrom v. St. Paul & Duluth R. Co.*, 61 Minn. 78 (63 N. W. 253). Dying declarations illustrate the principle of implied consent. Communications upon matters of business furnish a variety of examples. If it be supposed that a husband appoints his wife as his agent to sell his property, in that instance an implied consent is clearly manifested, for it must be assumed that he consents that she may inform the purchaser of her right to sell. There are a multitude of communications, particularly in relation to matters of business, made by one spouse to the other for the sole purpose of giving information so that such information may be used and, if need be, published. Indeed, many examples can be suggested where the communications would be utterly futile unless they could be published, and hence in those instances there results an unusually

strong implication of consent. It is generally held that communications made in the presence of third persons are not privileged (10 Ency. of Ev. 176), and although it is not now necessary to discuss the rule, or the reasons for the rule, governing this class of communications, it is manifest that the element of consent is not absent.

In brief, the words "any communication" mean that all communications between husband and wife are privileged, unless express or implied consent to publication is given, or unless the privilege is lost by being brought within one of the exceptions specified by the Code. There can be no force in the argument that the statute does not apply to alienation cases on the ground that such cases have to do with the separation and estrangement of the spouses. The statute declares that the communications are privileged if made "during the marriage" and, consequently, the words "during the marriage" serve as a complete answer to the suggested argument, although it may be conceded that the argument seems to have been approved at least in one jurisdiction having a statute containing the words "any communication."

The reasoning employed and the conclusion reached in *State v. Wilkins*, 72 Or. 77, 82 (142 Pac. 589), have not been overlooked. In that case, however, the court was dealing with a criminal action. In the instant case we are dealing with a civil action. It is settled that Section 733, Or. L., "does not apply to criminal prosecutions" and, consequently, what was said in *State v. Wilkins*, only dealt with a section of the Criminal Code and is not necessarily applicable to a section in the Civil Code, although both sections relate in some respects to the same subject matter: *State v. Luper*, 49 Or. 605, 607 (91 Pac. 444).

The judgment is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.

BENSON, J., not sitting.

Argued at Pendleton May 4, reversed June 8, 1920, rehearing denied January 11, 1921.

O'NEIL v. TWOHY BROS. CO.

(190 Pac. 306.)

Pleading—Deed—Statement of Legal Effect—Copy as an Exhibit in Haec Verba.

1. Where an executed deed is pleaded by plaintiff according to the legal effect which he puts upon it, and is also set out in *haec verba* as an exhibit attached to and made part of his final pleading, the deed itself prevails to the exclusion of a statement of its legal effect in the pleading.

Evidence—Deed—Oral Agreement—Contractual Consideration.

2. Under Section 713, L. O. L., an alleged oral agreement, pleaded as part of the consideration for a deed, and hence a contractual consideration, and not one of a monetary nature, is inadmissible to vary or add to the deed.

Waters—Irrigation—Vested Rights—Owner may Alienate the Ditch and Retain the Water.

3. The owner of a vested right for the irrigation of semi-arid agricultural lands by means of water from a creek drawn through a ditch may retain his water rights and alienate the ditch, the means by which he enjoyed such right, notwithstanding it is the only present means of employing the water rights.

Waters—Irrigation—Owner Conveying Ditch—Damages for Its Destruction.

4. Where the owner of semi-arid agricultural lands, producing crops when irrigated, had a vested water right in the waters of a creek through a certain ditch, and by deed conveyed his interest in the ditch to an irrigation district, without reservation, he could not thereafter complain of its destruction by the district's contractor or recover damages of the contractor.

Evidence—Irrigation—Ditch—Right to Use Reserved in Deed.

5. Where an owner of a water right by deed conveyed his interest in the ditch to an irrigation district and retained his water right,

2. On admissibility of parol evidence to vary, add to or alter written contracts generally, see notes in 17 L. B. A. 270; 2 Ann. Cas. 146; Ann. Cas. 1914A, 454; to vary deed, see note in 11 Am. St. Rep. 844.

he could not thereafter contradict his conveyance by parol, so as to claim the right to use of the ditch as the only means by which his water rights reserved in the deed could be enjoyed.

From Crook: JAMES U. CAMPBELL, Judge.

In Banc.

After alleging that the defendant is a corporation, the complaint proceeds in substance to state that at all times mentioned in the pleadings the plaintiff was the owner of certain agricultural lands in Crook County, semi-arid in their nature but capable of producing crops when irrigated; that the plaintiff is the owner of a vested water right from the year 1909 appurtenant to 250 acres of said realty and drawn from the waters of Ochoco Creek through a ditch known as the Table Land Ditch; that during the year 1918 the defendant was engaged in constructing a dam on Ochoco Creek below the point of diversion into that ditch; and that at all said times, including the month of May and months prior thereto, there was sufficient water to subserve plaintiff's right, "and the plaintiff had the right to the use of said ditch for the purpose of conveying water therein from said creek to his said lands; * * and the defendant at all times had full notice and knowledge of plaintiff's said rights." Continuing, the plaintiff charges that in constructing the dam the defendant went upon said Table Land Ditch, tore up and destroyed the same, and in the months of February, March, April and May, 1918, "willfully, purposely, wrongfully, carelessly, negligently, unnecessarily and in violation of plaintiff's said rights, and with knowledge thereof, interfered with, interrupted, obstructed and prevented the waters of said creek from flowing into said ditch or conduit and through the same to and upon the lands of the plaintiff, and purposely and willfully diverted and conveyed there-

from water flowing therein, and caused the same to run and flow elsewhere than to and upon the lands of the plaintiff," and failed to protect the ditch from injury, with the result that plaintiff's lands are deprived of water for irrigation purposes and by reason thereof his crops were depreciated in quality and quantity to his damage in a sum alleged. The whole complaint is traversed by the answer, except the allegation respecting the corporate character of the defendant and the plaintiff's ownership and occupancy of the lands described.

In the defendant's brief on appeal we find this statement:

"Leaving aside all other pleadings, we wish to present this case upon the complaint, the denials thereof in the answer and the third affirmative answer and defense and the reply thereto."

On account of this voluntary restriction we pass the first and second affirmative defenses and take up the third. Summarizing this in part, it appears therefrom that the defendant is a corporation; that the Ochoco Irrigation District was duly organized to erect and maintain a dam across Ochoco Creek, and a canal leading therefrom for the purpose of impounding the waters and delivering the same to lands included in the district, among which tracts were those of the plaintiff; that at all those times whatever right in the waters of Ochoco Creek the plaintiff had was being exercised by him through the Table Land Ditch, in which he had an interest; and that there was no other means of conveying the waters to his land except through that ditch. Thus far the reply admits the answer under consideration. The contested part of this defense is here quoted:

"On November 21, 1917, the plaintiff, in consideration of the sum of \$10,000 paid by said Ochoco Irrigation District, made, executed, and delivered to said Ochoco Irrigation District a deed of conveyance of all his right, title and interest in and to said Table Land Ditch, which deed was witnessed by two witnesses and was duly acknowledged by said plaintiff, and the same was duly recorded at page 109 of deed book 40 of the records of Crook County, Oregon; and thereupon said Ochoco Irrigation District entered upon and into possession of said Table Land Ditch and into possession of lands adjoining said Ochoco Creek, and, after preparing plans therefor and submitting the same to the State Engineer of Oregon and securing his approval thereof, constructed a dam across said Ochoco Creek and across said Table Land Ditch, and constructed said canal whereby the waters which had theretofore flowed in said river and in said ditch were dammed up and impounded and ceased to flow through the same prior to May 1, 1916, which said dam and canal and the construction thereof is the same dam and construction referred to and complained of in the complaint.

"After entering into possession of said Table Land Ditch pursuant to said deed said Ochoco Irrigation District employed defendant to construct said dam and canal, and pursuant to said employment defendant did, during the year 1917, commence construction of said dam and canal, and continued the construction thereof pursuant to said employment and under the direction of said district, until February, 1919."

In reply to the third answer and defense admits the execution of a deed to the irrigation district by the plaintiff, his wife and other parties, of date November 21, 1917, whereby in consideration of the sum of \$10,000 paid by the district to the grantors they did "by these presents bargain, sell, assign, set over, and convey unto the said Ochoco Irrigation District, its successors and assigns, all our right, title and interest in and to that certain real property known and designated as the

Table Land Ditch, and all water rights, rights of way and easements owned by the said Table Land Ditch and the Table Land Ditch Company, a partnership, comprised of the persons executing this conveyance, together with all branches, laterals and extensions thereof or connected thereto, under whatsoever name the same may be called or designated; * * together with rights of way across any or all of our said lands within the district for the canals or laterals which it may be necessary for the district to construct." The following reservation appears in the deed:

"This conveyance does not cover any water rights owned by the individuals making this conveyance nor to any water right appurtenant to their individual lands."

The document closes with covenants of seizin, against encumbrances, and general warranty. It is admitted that this conveyance was executed, acknowledged, delivered to the grantee and recorded.

The reply sets out in substance that the Table Land Ditch was constructed and owned by a partnership composed of certain individuals, of whom the plaintiff was one; that prior to the formation of the partnership each of the partners had initiated a right to the waters of Ochoco Creek, appropriated a portion thereof for irrigating purposes, and afterwards constructed the ditch as a partnership venture, as a means of conveying each separate appropriation of the water to the lands of the several appropriators; but states that the partnership never owned any of the water rights or any of the waters appropriated, they being the separate property of each appropriator and appurtenant to his separate lands. Reciting that the deed was made for a consideration of \$10,000, with the reservation to each member of the partnership and to each grantor

which has already been quoted, it is stated further in the reply:

“And as a part of said consideration for said deed, said Ochoco Irrigation District orally agreed with each of the grantors (and particularly with the plaintiff) that said Table Land Ditch should be thereafter continuously maintained and used by said grantors for the purpose of conveying the water appropriated by each of said grantors (including the plaintiff) in and through said ditch to the lands of each appropriator above mentioned (and including the lands of plaintiff mentioned in the complaint) and that the water appropriated by said grantors severally should be conveyed therein to the lands of each separate grantor until the irrigation works of said district should be constructed and completed.”

It is averred also that at the time the defendant entered into the contract with the district to construct the dam in question the defendant well knew all of the terms and conditions mentioned in the reply, the consideration for the deed as therein alleged and the rights of the plaintiff which he claims have been violated.

A general demurrer by the defendant to the further and separate reply to the third separate answer was overruled. Afterwards the defendant moved the court for judgment on the pleadings as to the cause of action set out in the complaint, because it appears on the face of the pleadings that plaintiff is not entitled to recover herein. This also was overruled. As stated in the bill of exceptions:

“Immediately after plaintiff rested his case defendant moved the court for the entry of nonsuit, said motion being made in the following language, to wit: ‘The defendant moves, at this time, the court for a judgment of nonsuit on the ground and for the reason that plaintiff has failed to make out a case against

this defendant sufficient to be presented to the jury for their determination.' ”

This was overruled and the defendant excepted. The trial was concluded by a verdict for the plaintiff and against the defendant, and from the ensuing judgment the defendant appeals. **REVERSED.**

For appellant there was a brief over the names of *Messrs. Malarkey, Seabrook & Dibble, Mr. James G. Wilson and Mr. G. L. Barnier*, with an oral argument by *Mr. E. B. Seabrook*.

For respondent there was a brief over the names of *Mr. William H. Wilson and Mr. N. G. Wallace*, with an oral argument by *Mr. Wilson*.

BURNETT, J.—1. In whatever form the questions in dispute may have been considered, they all turn upon the construction to be given the deed already mentioned. For the purposes of this opinion that instrument may be set down as an executed contract. It is pleaded by the plaintiff first according to the legal effect which he puts upon it and likewise is set out *in haec verba* as an exhibit, attached to and made part of his final pleading. In such a case the instrument itself prevails, to the exclusion of the statement of its legal effect in the pleading of which it is a part: *Haworth v. Jackson*, 91 Or. 272 (178 Pac. 926).

2. We here set down the oft-quoted Section 713, L. O. L.:

“When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be, between the parties and their representatives or successors in interest, no evidence of the terms of the agreement, other than the contents of the writing,”—except in certain cases not here involved.

The alleged oral agreement is pleaded as part of the consideration for the deed mentioned. It is therefore a contractual consideration, and not one of a monetary nature, and from *Sutherlin v. Bloomer*, 50 Or. 398 (93 Pac. 135), continuing through such cases as *Oregon Mill Co. v. Kirkpatrick*, 66 Or. 21 (133 Pac. 69); *Muir v. Morris*, 80 Or. 378 (154 Pac. 117, 157 Pac. 785), and *Elliott Contracting Co. v. Portland*, 88 Or. 150 (171 Pac. 760), the rule has been stated thus:

"The authorities are practically unanimous in holding that, where the statement in the written instrument as to the consideration is of a contractual nature, as where the consideration consists of a specific or direct promise by one of the parties to perform certain acts, it cannot be changed or modified by parol or extrinsic evidence. A party has a right to make the consideration of his agreement of the essence of his contract, and, when this is done, the consideration for the contract, with reference to its conclusiveness, must stand upon the same footing as its other provisions, and accordingly cannot be affected by the introduction of parol or extrinsic evidence."

See, also, *Interior Warehouse Co. v. Dunn*, 80 Or. 528, 535 (157 Pac. 806). The reply is a plain attempt to import into the agreement embodied in the deed additional particulars resting wholly in parol, and which the statute quoted expressly forbids, saying strictly that "no evidence of the terms of the agreement other than the contents of the writing" shall be admitted.

3-5. It was competent, as both parties admit in their arguments, for the plaintiff to retain his water right and alienate the means by which he enjoyed it. He did this by his deed, and conveyed his interest in the Table Land Ditch to the district without reservation. Hence, at the time of the grievances complained of, to wit, the tearing up and destruction of the con-

duit, he had no right or interest therein upon the invasion of which he might predicate damage. As the district owned the ditch, it rightfully could, as it did, contract with the defendant to tear it up and build another on its site, all without hindrance or objection by the plaintiff. The complaint avers that—

“During all of said time the plaintiff had the right to the use of said ditch for the purpose of conveying water therein from said creek to his said lands.”

But his deed contradicts this averment. The plaintiff's own pleading in reply showed that he had no cause of action. Called upon to prove his traversed allegation of the right to use the ditch, the proof he offered contradicted his statement. He argues that the reservation of the individual water rights as specified in the deed amounts to a reservation also of the ditch as the only means by which those rights can be enjoyed. Both parties, however, conceded it to be the law, and it is well supported by the precedents, that the ditch or other conduit carrying water may be conveyed separate from the water rights which it serves. The fact that the ditch constituted the only present means of enjoying the water rights does not destroy its alienability. In fact, the plaintiff by the very terms of his deed separated the ditch from the water right, and he cannot be heard to contradict his conveyance by parol.

However the question was treated, whether by demurrer to the reply, motion for judgment on the pleadings or motion for nonsuit, the ruling should have been in favor of the defendant. The Circuit Court was in error in denying the objections thus interposed by the defendant. The judgment is therefore reversed. **REVERSED. REHEARING DENIED.**

Motion to dismiss appeal overruled October 14, 1919, argued on the merits October 6, affirmed November 9, 1920, rehearing denied January 11, 1921.

NEALAN v. RING.

(184 Pac. 275; 193 Pac. 199.)

Time—Computing Time for Notice of Appeal by Excluding First Day.

1. Where judgment was entered March 13th, the 60-day period within which the notice of appeal is required to be served and filed under Section 550, L. O. L., as amended by Laws of 1913, page 617, will be computed, under Section 531, L. O. L., requiring first day to be excluded in computing time within which an act is to be done, by excluding both the 13th and the 14th of March.

Courts—Rule Working No Injustice, Acted upon by Profession, Affirmed.

2. Where rule announced by decisions of the Supreme Court, which have been generally received and acted upon by the profession, works no injustice, the decisions will not be overturned.

ON THE MERITS.

Appeal and Error—Transcript of Evidence Held not Sufficiently Authenticated.

3. Where transcript of testimony was certified by a reporter, with nothing to indicate that such reporter was the official reporter, and was not filed with the clerk of the court or authenticated by the certificate of the trial judge, the transcript was not sufficiently authenticated for consideration by Supreme Court under Sections 554, 927, 929, 931, 932, L. O. L.

Appeal and Error—Trial Judge may Authenticate Report of Testimony, Regardless of Whether There is an Official Reporter.

4. It is competent for the trial judge to authenticate a report of testimony whether there is an official reporter or not.

Appeal and Error—Only Question in Absence of Transcript is Sufficiency of Pleadings to Sustain Decree.

5. In absence of properly authenticated evidence, the only question to be considered on appeal is when the pleadings are sufficient to uphold the decree.

ON PETITION FOR REHEARING.

Appeal and Error—Transcript of Evidence—Failure to have Same Properly Authenticated—Effect—When Application to Amend Transcript Deemed too Late.

6. Where appellant has failed to have a properly certified transcript made and filed, and no application to amend the same was

1. On exclusion or inclusion of Sunday or holiday in computation of time for taking or perfecting appeal, see note in *Ann. Cas.* 1917E, 930.

On the rule as to first and last day in computing time for taking appeal, see notes in 49 *L. R. A.* 226, and 15 *L. R. A.* (N. S.) 689.

made until after cause had been argued and submitted and an opinion handed down by the appellate court, *held*, the application comes too late.

From Linn: GEORGE G. BINGHAM, Judge.

In Banc.

On motion to dismiss appeal.

OVERRULED.

Messrs. Weatherford & Wyatt, for the motion.

Mr. Walter C. Winslow, *contra*.

McBRIDE, C. J.—This is a motion to dismiss an appeal. The judgment was entered March 13, 1919. The notice of appeal was filed May 13, 1919. Section 550, L. O. L., as amended by subdivision 5, Chapter 319, Gen. Laws 1913, provides in substance that an appeal, if not taken in open court at the time of the rendition of the judgment or decree, shall be taken by serving and filing the notice of appeal within sixty days from the entry of the judgment or decree appealed from. Section 531, L. O. L., provides, among other matters, that—

“The time within which an act is to be done, as provided in this Code, shall be computed by excluding the first day and including the last, unless the last day fall upon Sunday, Christmas, or other nonjudicial day, in which case the last day shall also be excluded.”

Respondent contends that by virtue of these provisions, the thirteenth day of March should be excluded and the 14th included, which method of computation would cause the filing of the notice herein to fall upon the sixty-first day after the entry of judgment, or one day too late. Appellant claims that the 14th should be excluded, which method of computation would allow the whole of the thirteenth day of May for filing the notice, which would consequently be within sixty days.

1, 2. Decisions of other states upon this point are conflicting and the question is not free from difficulty, but we are of the opinion that the cases of *Pringle Falls Power Co. v. Patterson*, 65 Or. 474 (128 Pac. 820, 132 Pac. 527), and *Vincent v. First Nat. Bank*, 76 Or. 579 (143 Pac. 1100, 149 Pac. 938), settle the contention in favor of appellant. Were the matter *res integra* a different conclusion might plausibly be contended for, but these decisions having been generally received and acted upon by the profession, it would be injudicious to overturn them, especially as the rule therein announced works no injustice.

The motion is overruled.

OVERBULED.

Affirmed October 6, 1920.

ON THE MERITS.

(193 Pac. 199.)

Department 1.

Substantially, this is a suit in which the plaintiff, claiming to be the owner of certain lands in Linn County upon which there is standing a large quantity of merchantable timber, sues to enjoin the defendant from a continuance of a trespass, and from cutting any of the timber. The answer denies the plaintiff's ownership of the land, and in fact traverses the whole complaint, except that there is standing timber upon the premises, and that the defendant went upon the land and began to cut the timber. The answer further alleges a contract with the plaintiff through his agent, P. J. Nealan, whereby the defendant was to go upon the land, cut the timber thereon, and pay for it at the rate of one dollar per thousand feet, board measure. This, in turn, is denied by the reply. A

further defense, to the effect that P. J. Nealan is the real owner of the land, the title of which is held in the name of his father, the plaintiff, and that a contract was made with the son for the cutting of the timber is also alleged in the answer and denied by the reply.

After a trial before it, the Circuit Court denied the prayer of the complaint and dismissed the suit, and the plaintiff appeals. AFFIRMED.

For appellant there was a brief over the names of *Mr. Walter C. Winslow* and *Mr. V. A. Goode*, with an oral argument by *Mr. Winslow*.

For respondent there was a brief over the name of *Messrs. Weatherford & Wyatt*, with an oral argument by *Mr. J. R. Wyatt*.

BURNETT, J.—3. We are prevented from an examination of the case on the merits by the absence of an official report of the testimony. By Section 927, Or. L., the judge of each judicial district has authority in his discretion to appoint a stenographer, to be known as the official reporter, who before entering upon the discharge of his official duties shall take an oath faithfully to perform the duties of the office. Having taken stenographic notes of the evidence at the trial of the case, the official reporter must file the same in the office of the clerk, and, when either party to the suit requires a transcript of the testimony, the reporter is required to make such transcript, under certain conditions, certify the same, and file it with the clerk of the court. The transcript, thus authenticated, is deemed a *prima facie* correct statement of the testimony. In the absence or inability of the official reporter to act, the judge may appoint a competent stenographer to act as such, *pro tem.*, who

shall possess the same qualifications and take the same oath as the official reporter: Sections 929, 931, 932 and 933, Or. L. It is provided by Section 554, Or. L., subdivision 1, that:

“If the appeal is from a decree and the cause is to be tried anew on the testimony, the clerk shall attach together the testimony, depositions, and other papers on file in his office containing the evidence heard or offered on trial in the court below, and deliver the same to the appellant, taking therefor his receipt in duplicate, one of which receipts he shall file in his office, and the other deliver to the respondent when so required. Such evidence shall be deemed a part of the transcript or abstract, and shall be filed therewith.”

In the instant case there are before us, annexed together, what the clerk of the Circuit Court declares by his certificate to be copies of the notice of appeal, undertaking on appeal, order extending time for filing transcript, and what he certifies and makes part of the transcript, defendant's exhibits A, B, C, D and E, but there is no other testimony thereto annexed. Accompanying the papers is what perhaps may be a transcription of testimony in the cause, certified thus:

“In the Circuit Court of the State of Oregon for the County of Linn, Department No. 2.

“Theodore Nealan,

Plaintiff,

vs.

Al. Ring,

Defendant.

“REPORTER'S CERTIFICATE.

“State of Oregon,
County of Marion,—ss.

“I, Edna Garfield, do hereby certify that at Albany, Oregon, on the 24th day of December, 1918, I reported in shorthand the proceedings had in the above entitled

cause; that subsequently the same was reduced to typewriting, and that the foregoing pages, numbered from 1 to 59, inclusive, constitutes all of the oral testimony adduced at said trial, and is an accurate transcript of said shorthand notes so taken by me, and of the whole thereof; that the exhibits therein referred to, consisting of Defendant's Exhibits A, B, C, D and E, respectively, constitutes all of the documentary evidence offered and received at said trial; that each witness, before testifying, was first duly sworn to tell the truth, the whole truth and nothing but the truth.

"Dated at Salem, Oregon, July 1, 1919.

"(Signed) EDNA GARFIELD,
"Reporter."

This transcript of testimony is not otherwise authenticated. It is not attached to the exhibits mentioned. It contains no file-mark or other evidence indicating that it had ever been in the custody of the county clerk. The reporter does not pretend to be the official reporter of the Circuit Court. For aught that appears she may have been the private stenographer of one of the parties, acting without any authority from the court. It is said in *Neal v. Roach*, 61 Or. 513, 515 (107 Pac. 475, 476):

"Such evidence might have been identified by the judge who tried this suit and rendered the decree herein, and he undoubtedly could, by a proper certificate, have made the judgment-roll in the former suit, if it was received in evidence, a part of the transcript in this suit: Section 827, B. & C. Comp. [Section 838, Or. L.]; *Hume v. Rogue River Packing Co.*, 51 Or. 237 (83 Pac. 391, 92 Pac. 1065, 96 Pac. 865). * * It is sufficient to say that, unless it is identified and certified in the manner indicated, it will not be examined."

In that case the clerk had made an affidavit that a certain judgment-roll had been introduced in evidence,

but the court held that his affidavit was not competent evidence of that fact. The official reporter had died after taking stenographic notes of the testimony, but before the same had been transcribed, and no other shorthand writer could transcribe them.

The regular channel through which the evidence reaches this court is that prescribed by the statute. The report of the testimony must originate with the official stenographer, if one is used, and his certificate is sufficient authentication of it for the purposes of suits in equity: *Tallmadge v. Hooper*, 37 Or. 503 (61 Pac. 349, 1127); *Sanborn v. Fitzpatrick*, 51 Or. 457 (91 Pac. 540). These precedents and the instant case must be distinguished from *Thomsen v. Giebisch*, 95 Or. 118 (173 Pac. 888, 186 Pac. 10), and *Utah-Idaho Sugar Co. v. Lewis*, 95 Or. 224 (187 Pac. 590), where we decided that the trial judge or his successor alone could make and sign a bill of exceptions in an action at law, although the same might consist largely of a transcript of the testimony. There is no such thing as a bill of exceptions in an equity case, and in this case we are concerned only with the manner of authenticating the testimony.

4. The transcript of the stenographic notes must be filed with the clerk. It is, of course, competent for the trial judge to authenticate a report of the testimony, whether there is an official reporter or not. But we cannot examine any such document not authenticated either by the judge or the official reporter, and which does not come to us through the regular statutory channel. In the instant case, the report of testimony is attested neither by an official stenographer nor by the certificate of the trial judge. This does not constitute the material upon which we can re-examine the question of fact involved in the case.

5. Owing to this absence of properly authenticated evidence, the only question to be considered is whether or not the pleadings are sufficient to uphold the decree: *Howe v. Patterson*, 5 Or. 353; *Wyatt v. Wyatt*, 31 Or. 531 (49 Pac. 855); *In re Morrison's Estate*, 48 Or. 612 (87 Pac. 1043); *Scott v. Smith*, 58 Or. 591 (115 Pac. 969); *Matthews v. Matthews*, 60 Or. 451 (119 Pac. 766); *O'Connor v. Towey*, 70 Or. 399 (140 Pac. 625); *United States Nat. Bank v. Shefler*, 77 Or. 579 (143 Pac. 51, 152 Pac. 234). The sufficiency of the pleadings to justify the decree entered by the Circuit Court is not questioned. In brief, the state of the record precludes us from an examination of the questions urged at the argument, respecting the sale of timber considered as the disposal of an estate in land, and whether or not the statute of frauds is applicable to a transaction of the kind here in dispute. The decree of the Circuit Court must be affirmed.

AFFIRMED.

McBRIDE, C. J., and HARRIS and JOHNS, JJ., concur.

Denied January 11, 1921.

ON PETITION FOR REHEARING.

(193 Pac. 747.)

On petition for rehearing. DENIED.

Mr. Walter C. Winslow and Mr. V. A. Goode, for the petition.

Messrs. Weatherford & Wyatt, contra.

Department 1.

McBRIDE, J.—This cause was argued and submitted on October 6, 1920, and an opinion written by Mr. Justice BURNETT affirming the decree of the Circuit Court was handed down on November 9, 1920. In that opinion we declined to consider the testimony in the case for the reason that such testimony had not been filed with the clerk of the Circuit Court or authenticated by the circuit judge as required by law. After this opinion had been rendered, the appellant procured the transcript of testimony to be certified by the circuit judge, and now moves for a rehearing on the merits. The affidavit of one of appellant's attorneys is substantially to the effect that he seasonably had the testimony extended and showed it to the attorneys for respondent, who assented to its accuracy; that he has no knowledge or recollection as to how it found its way into the office of the clerk of the Circuit Court; and that the failure to have it certified was due to the excusable oversight of appellant's attorney, who supposed that this had been done, until he saw the opinion of Mr. Justice BURNETT in this case. He now asks leave to have the case reheard upon the merits.

This application comes too late. Had it been made before the hearing, we would have been inclined to permit the transcript to be amended; but to allow a party after having tried his case upon the transcript he has presented, and after defeat, to procure an amendment of it and a rehearing upon the transcript as amended, would lead to intolerable delays in the administration of justice. This is especially the case in instances like the present, where the defect was pointed out in the respondent's brief. We quote from that brief the following:

“There is another feature in this case, that we are to presume that the transcript contains all of the evidence and exhibits. There was no official reporter appointed by the court to report or transcribe the evidence in the case and the same does not bear the file mark of the clerk of the court, nor is it identified in his certificate or by the certificate of the trial judge.”

This brief was filed November 8, 1919, and the hearing was had on October 6, 1920, so that appellant had nearly a year prior to the hearing in which to procure the certificate of the trial judge, had he deemed it material.

Neither the affidavit nor the transcript of testimony shows any such controlling equities as should induce this court to disregard the salutary rule announced in *State v. Jennings*, 48 Or. 483, 494 (87 Pac. 524, 89 Pac. 421), which is substantially to the effect that amendments to the transcript will not be permitted after a cause has been argued and submitted and an opinion handed down: See, also, *McCann v. Burns*, 73 Or. 167, 172 (136 Pac. 659, 143 Pac. 916, 1099, 1100); *Noble v. Watrous*, 84 Or. 418, 426 (163 Pac. 310, 165 Pac. 349); *Malloy v. Marshall-Wells Hardware Co.*, 90 Or. 303, 359 (173 Pac. 267, 175 Pac. 659, 176 Pac. 289).

The petition for rehearing is denied.

AFFIRMED. REHEARING DENIED.

BURNETT, C. J., and HARRIS and JOHNS, JJ., concur.

Argued November 18, 1920, affirmed January 11, 1921.

MARSHALL v. MARSHALL.

(194 Pac. 425.)

Pleading—Construed Against Pleader on Demurrer.

1. Pleadings, when tested by demurrer, must be construed most strongly against the pleader.

Pleading—Demurrer Admits Truth of Facts Well Plead.

2. Demurrer admits the truth of what is well pleaded and of every reasonable and proper inference deducible therefrom.

Executors and Administrators—Complaint Held to State Capacity to Sue as Executor.

3. In an action by an executor, allegations that the deceased died testate, that prior to commencement of action plaintiff was "duly and legally appointed executor" of her estate, and that after specified date "has been and now is the duly appointed and qualified and acting executor" of her estate, *held* sufficient on demurrer to plead capacity to sue as executor; the reasonable inference being that he was appointed executor by a court of competent jurisdiction, had qualified under such appointment, and had entered upon the discharge of his duties.

Limitation of Actions—Payment on Note Held to Revive Cause of Action.

4. Under Sections 24, 25, Or. L., where payee in her will provided that maker should pay funeral expenses and that such payment should be credited as interest on note, and where maker in compliance therewith paid such expenses and amount thereof was credited upon note by and with maker's assent, the payment was sufficient to revive the cause of action on the note after expiration of period of limitations.

From Multnomah: GEORGE W. STAPLETON, Judge.

Department 2.

At Portland, Oregon, December 26, 1905, James I. Marshall executed to Emily Marshall his certain promissory note for \$2,000, payable after date, "with interest after July 21st at the rate of 4 per cent per annum until paid." This is an action by the plaintiff, F. C. Marshall, as executor of her estate, to recover from the defendant the amount of the note, with accrued interest and attorney's fees. After pleading

the note according to its tenor, the amended complaint alleges:

"II. That thereafter and on the eighteenth day of March, 1918, and prior to the commencement of this suit, the said Emily Marshall died testate in the county of Multnomah, State of Oregon, and that thereafter, and prior to the commencement of this action, the above named plaintiff, F. C. Marshall, was duly and legally appointed executor of the estate of said Emily Marshall, deceased, and that ever since said date said F. C. Marshall has been and now is the duly appointed, qualified, and acting executor of the estate of said Emily Marshall, deceased.

"III. That the said defendant during the lifetime of the said Emily Marshall paid interest on said note up to and including the first day of December, 1914.

"IV. That according to the terms of the said will of Emily Marshall, deceased, it was provided that said defendant, James I. Marshall should pay the funeral expenses of said Emily Marshall and that said payment should be credited as interest on the above described note, and that pursuant to said terms of said will and in compliance therewith the said defendant, James I. Marshall, did pay the funeral expenses of Emily Marshall in the sum of \$145.80, which said sum plaintiff has credited on said note."

It is then alleged that—

"There is now due and owing and unpaid on said note from the defendant to plaintiff the principal sum of \$2,000, with interest thereon at the rate of 4 per cent per annum from the first day of August, 1916."

The defendant demurred upon the grounds:

"That it appears upon the face of said complaint that the plaintiff has not the legal capacity to maintain said action.

"That the said action has not been commenced within the time limited by the laws of the State of Oregon.

"That the said complaint does not state facts sufficient to constitute a cause of action in favor of the plaintiff and against the defendant."

The demurrer was overruled. Defendant declined to plead further, default was entered, and judgment was then rendered in favor of the plaintiff for the amount of the note with such interest, for \$150 attorney's fees, and costs, from which the defendant appeals, claiming that the court was without jurisdiction to enter a judgment without the filing of an affidavit of nonmilitary service, that "said demurrer was well taken in law and ought to have been sustained," and that the action was barred by the statute of limitations.

AFFIRMED.

For appellant there was a brief over the name of *Messrs. McCamant, Bronaugh & Thompson*, with an oral argument by *Mr. Earl C. Bronaugh*.

For respondent there was a brief over the names of *Mr. J. M. Hickson*, *Mr. Charles Coston* and *Messrs. Cake & Cake*, with an oral argument by *Mr. Hickson*.

JOHNS, J.—1, 2. As contended by the appellant:

"It is a well-established rule that pleadings, when tested by demurrer, must be construed most strongly against the pleader": *Haines v. City of Forest Grove*, 54 Or. 443 (103 Pac. 775).

It is also true, and this court has held, that—

"The demurrer admits the truth of what is well pleaded and of every reasonable and proper inference deducible therefrom": *Wills v. Nehalem Coal Co.*, 52 Or. 70 (96 Pac. 528).

3. Tested by this rule, the defendant admits the execution of the note in the City of Portland on December 26, 1905; that on the 18th of March, 1918, and prior to the commencement of the action, "Emily Marshall died testate in the county of Multnomah,

State of Oregon"; that "prior to the commencement of this action" the plaintiff "was duly and legally appointed executor" of her estate; and that "ever since said date said F. C. Marshall has been, and now is, the duly appointed, qualified, and acting executor of the estate of said Emily Marshall." Defendant points out that there is no specific allegation that the deceased was a resident of Multnomah County at the time of her death, or that she made a will, or that it was admitted to probate, or that the plaintiff was appointed executor under the terms of any will, or that his appointment was made by the County Court of Multnomah County or any probate court, and, for such reasons, contends that the plaintiff could not maintain the action as executor and that the trial court did not have jurisdiction. The complaint does allege that she died testate. This she could not have done, had she made no will. It also states that she died in Multnomah County, where the note was executed and made payable. It further alleges that the plaintiff "was duly and legally appointed executor" of her estate. He could not have become executor of her estate if she had not made a will, and he could only have been "duly and legally appointed executor" by a court of competent jurisdiction, or a probate court. The complaint further alleges that ever since his appointment plaintiff "has been and now is the duly appointed, qualified, and acting executor of the estate." In *Lethbridge v. City of New York* (Super.), 15 N. Y. Supp. 562, it is held that an allegation in the complaint that the plaintiff was "duly appointed" to a certain office would imply that everything had been done which was necessary to a legal appointment. In overruling some of its former decisions, this court, in *Ashley v. Pick*, 53 Or. 410, 416 (100 Pac. 1103, 1105), says:

"We have taken this opportunity to indicate that the rule in respect to the manner of pleading a judgment of an inferior tribunal, as announced in *Page v. Smith*, 13 Or. 410 (10 Pac. 833), will no longer be observed, and to give notice that where it is stated in the formal allegations of parties that a judgment was 'duly given' or 'duly made' the statute has been fully complied with, and that the averment will be held to be sufficient."

The case of *Long v. Dufur*, 58 Or. 162 (113 Pac. 59), relied upon by the appellant, also holds:

"If it were a matter of pleading a judgment or decree of a court, it would be sufficient to state that the same was duly given or made. * * On the other hand, where a contract is to be pleaded, it should be set out either according to its legal effect or in its very words."

On the point here involved, the case of *Long v. Dufur* follows and approves the case of *Ashley v. Pick*.

As to probate matters, in all cases the County Court is vested with primary jurisdiction over the estates of deceased persons, and the original power to hear and determine petitions for letters, and to appoint executors and administrators: *In re John's Will*, 30 Or. 494 (47 Pac. 341, 50 Pac. 226, 36 L. R. A. 242).

If he was "duly and legally appointed," and ever since has been and is now the "duly appointed, qualified, and acting executor," it must follow as a "reasonable and proper inference" that he was appointed by a court of competent jurisdiction, and that he qualified under such appointment and entered upon the discharge of his duties.

4. In the absence of any payment, the note would show upon its face that it is barred by the statute of

limitations. To toll the statute the plaintiff alleges that—

“Defendant, during the lifetime of the said Emily Marshall, paid interest on said note up to and including the first day of December, 1914.”

There is no specific allegation as to when any interest was paid, how many interest payments were made, to whom they were made, or the amount of any payment, but it is fair to assume that such interest was paid some time between the date of the note and the death of Emily Marshall on March 18, 1918. Section 25, Or. L., enacts:

“Whenever any payment of principal or interest has been or shall be made upon an existing contract, whether it be bill of exchange, promissory note, bond, or other evidence of indebtedness, if such payment be made after the same shall have become due, the limitation shall commence from the time the last payment was made.”

The action in the instant case is founded upon a demand note, and any interest payment was made after the note became due. This section says, if the payment is made after maturity, “the limitation shall commence from the time the last payment was made.” There is no allegation in paragraph III of the complaint as to when the last payment of interest was made; but, assuming that the allegations under that paragraph are not sufficient to toll the statute, in paragraph IV the complaint further alleges, and the demurrer admits, that by the terms of the will of deceased it was provided that the defendant should pay her funeral expenses “and that said payment should be credited as interest on the above-described note, and that pursuant to said terms of said will and in compliance therewith” the defendant did pay such ex-

penses in the sum of \$145.80, "which said sum plaintiff has credited on said note." This is an admission that the will of the deceased provided that the defendant should pay her funeral expenses and that the amount of such expenses should be credited as interest on the note, that pursuant to the terms of the will and in compliance therewith the defendant did pay such funeral expenses to the amount of \$145.80, and that such payment was credited on the note.

Section 24, Or. L., enacts:

"No acknowledgment or promise shall be sufficient evidence of a new or continuing contract, whereby to take the case out of the operation of this title, unless the same is contained in some writing, signed by the party to be charged thereby; but this section shall not alter the effect of any payment of principal or interest."

Sections 24 and 25, Or. L., were construed in *Creighton v. Vincent*, 10 Or. 56. In that case the original indebtedness was barred, and the only question was the refusal of the trial court to give a requested instruction that a partial payment applied by the defendant as a credit upon the note with the assent of the plaintiff would have the legal effect "to take the same out of the operation of the statute of limitations." It was claimed that a correct solution of that question would depend upon the construction which should be placed upon section 25, and it was held that this section did not apply; that it "refers only to payments made on contracts before the statute has run against them, and fixes by such payment a new date upon which the limitation of actions thereon commences to run *de novo*." The opinion quotes from *Partlow v. Singer*, 2 Or. 310, which says:

"Ordinarily the statute begins to run when the note is due; in this case the statute fixes the time at the

date of the last payment, and such plain language can have no other signification."

After quoting Section 24, the opinion in the Creighton case says:

"It may be observed that this section is nearly a transcript of the enacting clause of the statute, 19 Geo., 4th ch. 14, commonly called Lord Tenwiden's act, and that payment of principal or interest on a specific demand is still retained by the statute as sufficient to keep it in force. The instruction only asked that the sum applied by the defendant as a credit upon the indebtedness, with the assent of plaintiff, was a payment which would take the case out of the operation of the statute. The payment by a debtor of a certain sum to his creditor, with the understanding that it shall be treated as a payment on his debt, will be sufficient to revive the cause of action barred by the statute. And when the creditor applies the amount paid upon the debt as a credit, with the assent of the plaintiff, it is sufficient to revive the debt."

By his demurrer the defendant, Marshall, admits that the will of the deceased provides that he should pay her funeral expenses and that such payment should be credited as interest on the note, "and that pursuant to said terms of said will and in compliance therewith" the defendant did pay \$145.80 as such expenses, which amount plaintiff credited upon the note. It was a voluntary payment, made pursuant to and in compliance with the will of the deceased, which provided "that said payment should be credited as interest" on the note; moreover, it was so made to be applied on the note, and defendant knew that it would be, and it was, credited upon the note. Hence, that payment was sufficient to revive the cause of action. It was a credit made upon the note, by and with the assent of the defendant, within the meaning of Sec-

tion 24, Or. L., as construed in *Creighton v. Vincent*, 10 Or. 56.

Although the complaint is not a model pleading and is very loosely drawn, taken as a whole it tells the statute and states a cause of action.

Judgment affirmed.

AFFIRMED.

McBRIDE, BEAN and BROWN, JJ., concur.

Argued November 23, 1920, affirmed January 11, 1921.

WHITE v. HARRISON.

(194 Pac. 431.)

Vendor and Purchaser—Burden of Proving Fraud by Vendor Rests on Purchaser.

1. In a suit to foreclose a purchase-money mortgage, where defendant alleged fraud in the sale of the property to him, and asked for rescission of the contract, the burden of proving the fraud rested on defendant.

Evidence—Greater Number of Witnesses is of Weight, but not Conclusive.

2. In determining the issue of fraudulent representations in the sale of land, the fact that the greater number of witnesses denied the fraud, though not conclusive, is an element in determining the truth.

Appeal and Error—Findings in Equity as to Fraud are of Influence, but not Controlling.

3. In a suit in equity, findings by the trial judge who saw and heard the witnesses as to the existence of the alleged fraud are of influence on appeal, but are not controlling.

Vendor and Purchaser—Evidence Held not to Establish Fraud by Vendor.

4. In suit to foreclose a purchase-money mortgage, where defendant sought rescission of the contract because of fraudulent representations, where defendant's testimony of the fraud was uncorroborated, while plaintiff's denial was corroborated by other witnesses, and defendant admitted he had an opportunity to examine the land, evidence held insufficient to establish the fraud.

From Klamath: D. V. KUYKENDALL, Judge.

2. On preponderance of evidence as determined by mere number of witnesses, see note in *Ann. Cas.* 1913D, 676.

Department 1.

This is a suit to foreclose a purchase-money mortgage given by the defendant to the plaintiff on certain lands in Klamath County described by legal subdivisions. After denying the existence of consideration for the notes evidencing the indebtedness, and challenging certain legal conclusions, the defendant avers that at the time the notes and mortgage were executed:

"The plaintiff * * did represent to this defendant that such real estate was well adapted for the business and purpose of operating thereon a livestock ranch and upon which defendant could carry on the business of dealing in livestock such as cattle, horses, sheep, etc., that there was plenty of open range adjoining and in the vicinity of said place upon which defendant could run more than 300 head of cattle and horses, and that such real estate furnished wild grass and water for such business, and that such real estate would produce abundance of wild grass and water during each year for such purpose and business and that portions of such lands would produce and yield one ton per acre of wild hay during each year, and the plaintiff at said time and place did further represent that certain lands then enclosed by fence and situated in the immediate vicinity of the lands described in said mortgage and some portions thereof joining thereon and amounting to approximately 145 acres constituted and were a portion of the lands described in said mortgage, all of which representations were absolutely false."

Further averments of the answer make a good pleading of fraud within the precedents in this state where the effort is to work out a rescission of the contract involved. The prayer, in substance, is that the defendant recover the money he has paid on the purchase price and the reasonable value of improve-

ments he has installed on the premises, and that the notes and mortgage be held to be void.

The reply challenges the new matter in the answer. The Circuit Court made findings of fact to the effect that the charges of fraud were not sustained by the evidence, and entered a decree foreclosing the mortgage. The defendant appeals. **AFFIRMED.**

For appellant there was a brief and an oral argument by *Mr. J. H. Carnahan*.

For respondent there was a brief over the names of *Mr. C. F. Stone* and *Messrs. McCoy & Gans*, with an oral argument by *Mr. Stone*.

BURNETT, C. J.—Included in the transaction of buying the land in question was the purchase of considerable personal property on the farm, which belonged to the plaintiff. No offer of restoration to the former status of the property is pleaded or proved. The issue is narrow, and the evidence is confined mainly to the statement that the hay land would not produce one ton per acre, as charged in the answer, and further that the realty pointed out did not all belong to the plaintiff. There is an irreconcilable conflict in the testimony. The defendant is practically alone in his statements that the representations were made. On his own evidence it appears that he took too much for granted. He was purchasing the land by legal subdivisions, necessarily involving rectangles, included in boundaries running to the cardinal points of the compass. He himself admits that the inclosures were in irregular shapes, and that he could see for himself that the fences were not on the lines, but he thought the variation was slight. The plaintiff, his wife and son, all declare that the defendant's

attention was called to the fact that the fences were not on the boundary lines. That matter is explained by testimony on the part of the plaintiff that in the settlement of the country in that region fences followed the line of least resistance; that no attention was paid to government lines in the first instance; and that inclosures corresponded to government boundaries only when permanent fences were finally installed. As to the quantity of hay that could be raised on the property, the defendant declares that the plaintiff told him it would raise one ton per acre. This is denied by the plaintiff. The latter admits he told the defendant that some of the land, if it should be improved, would produce one ton per acre.

1, 2. The burden of proof on allegations of fraud rests upon the defendant, who alleges it. The greater number of witnesses in the case on points of dispute are those for the plaintiff, and, although this does not conclude us, yet, all other things being equal, the result naturally would be that the number of witnesses would be an element in determining the truth of the matter in controversy. Considering such a case in *Smith v. Griswold*, 6 Or. 440, the court held, in substance, that when there is an issue of fact and the plaintiff supports the allegations in his complaint by his deposition and no other testimony, and the defendant in his deposition denies these allegations, there is no preponderance of proof: See, also, *Rolston v. Markham*, 36 Or. 112 (58 Pac. 1099).

3. We are also influenced, but of course not controlled, by the fact that the trial judge saw the witnesses and had a far better opportunity to consider the weight of their testimony than we, who have only a paper record before us.

4. For the most part, also, the precedents cited by the defendant in support of his position are not in point, in that they contain elements of concealment and prevention of the aggrieved party from making inquiry. For instance, in *Steen v. Weisten*, 51 Or. 473 (94 Pac. 835), the party claiming to be defrauded had made no previous examination for the purpose of determining the quality of the land or the timber thereon, and was dissuaded by the seller from doing so. In *Boelk v. Nolan*, 56 Or. 229 (107 Pac. 689), the plaintiff had been residing for several years in California and had left his land in Tillamook County in charge of a friend, who, believing him to be dead, suffered the land to be sold for taxes and bought it in, with the avowed purpose of preserving it for the plaintiff or his heirs in case of his death, not having heard from him for several years. Having secretly ascertained the whereabouts of the plaintiff, the defendant went to California and represented that he himself had acquired title to the land and that it had been sold for taxes, and by telling the half truth about the matter and concealing the real state of affairs, induced the plaintiff to give a quitclaim deed for a mere nominal sum. The plaintiff there was induced by the representations of the defendant to forbear from making original investigation. In *Davis v. Mitchell*, 72 Or. 165 (142 Pac. 794), the property in dispute was an apartment house. The plaintiff, claiming to be defrauded, had opportunity to examine only three or four of the apartments and was prevented by the seller from looking at the others on the ground that the occupants did not wish to be disturbed. In *Palmiter v. Hackett*, 95 Or. 12 (185 Pac. 1105, 186 Pac. 581), the property involved was a building which had been occupied in the lower story by a garage and

in the upper part as housekeeping rooms. Unknown to the purchaser, this was contrary to city ordinances. The seller, although informed of this fact, concealed it from the plaintiff and represented the building to be available for both purposes. This was held as ground for rescission. No such elements appear here. The defendant himself says that no effort whatever was made to prevent him from making full investigation of the property and its capabilities for the purpose for which he wished to buy it. The evidence shows that it had been used as a stock ranch, but not so extensively as the defendant undertook afterwards to use it. In this matter, as well as others, the testimony of the defendant is disputed by that of the plaintiff.

In brief, the defendant has asserted fraud, assuming the burden of proving the same. Standing practically alone in his assertion, both as a pleader and as a witness, he is confronted by a greater number of witnesses, apparently of equal credibility, in opposition to his contention. He has not made out his case by a preponderance of the evidence, and hence the decree of the Circuit Court must be affirmed.

AFFIRMED.

BEAN, HARRIS and McBRIDE, JJ., concur.

Argued at Pendleton October 26, 1920, reversed January 11, 1921.

MARKS v. TWOHY BROS. CO.

(194 Pac. 675.)

Evidence—Parol Evidence Rule One of Substantive Law.

1. Section 713, Or. L., making evidence of an agreement other than the contents of the writing to which it was reduced by the parties inadmissible with certain exceptions, and Section 798, creating a presumption of the truth of facts recited in a written instrument as against the parties to the instrument, embody a well-established rule of common law, which is one not of evidence merely, but of substantive law.

Evidence—Parol Evidence Rule Does not Apply to Receipts.

2. As a general rule, the exclusion of parol or extrinsic evidence to contradict written instruments does not apply to mere receipts, or writings which are in the nature of receipts, which may be contradicted, varied, or explained.

Evidence—Recital of Payment may be Contradicted or Varied.

3. A recital in a written instrument as to the payment of the consideration is in the nature of a receipt, and may be contradicted or explained by parol or extrinsic evidence, unless such contradiction would defeat some substantial and contractual provision of a valid written instrument.

Evidence—Contradicting Consideration Clause Inadmissible if It Defeats Deed.

4. Parol evidence, offered to contradict the consideration clause of a conveyance, which, in effect, defeats the operation of the conveyance or lessens its effect, or incorporates therein a reservation not enumerated in the conveyance, is inadmissible.

Evidence—Parol Evidence Inadmissible to Show Contractual Consideration for Conveyance of Ditch.

5. Parol evidence that the parties to a conveyance of a ditch, which expressly reserved therefrom the water right which had flowed through the ditch, agreed as part of the consideration that the grantee should maintain the ditch fit for conveyance of the waters reserved, adds a contractual consideration to the moneyed consideration stated in the deed, which nullifies the rights to the ditch conveyed, and is therefore inadmissible.

Evidence—Contractual Consideration cannot be Added to Money Consideration.

6. A purely money consideration mentioned in a written instrument which is complete on its face cannot be amplified by parol evidence so as to ingraft into the instrument an additional executory or contractual consideration, which would impose on one of

1. On the general rule that parol evidence is not admissible to vary, add to, or alter a written contract, see note in 17 L. R. A. 270. On parol evidence to vary deed, see note in 11 Am. St. Rep. 844.

the parties an affirmative obligation, of which there is no indication or suggestion in the writing.

Evidence—Parol Evidence Admissible to Show Want or Failure of Consideration.

7. Parol evidence to show an entire absence or a partial or total failure of consideration is not within the rule excluding such evidence to vary or contradict the terms of a written instrument.

Waters and Watercourses—Ditch can be Conveyed Separate from Waters Carried Therein.

8. The owners of a ditch may convey the ditch to another, separate from their right to the water for the irrigation of their lands which had been previously carried in the ditch.

Waters and Watercourses—Reservation of Water Right from Ditch Conveyance Held not to Include Right to Carriage of Waters.

9. Where the owners of an irrigation ditch conveyed it to an irrigation district to enable the latter to construct its canal along the line of the ditch, which necessitated destruction of the ditch, a reservation of the water right of grantors did not carry with it the right to use the ditch to convey the reserved water to the lands of grantors.

Trespass—Authority of Irrigation District Giving Contractor Right to Interrupt Flow is a Defense.

10. In an action against a contractor for interference with the flow of water to plaintiff's land through an irrigation ditch, the authority of irrigation district, giving contractor the right to interrupt the flow, is a defense, if the title of the district to the ditch was superior to that of the land owner.

From Crook: JAMES U. CAMPBELL, Judge.

In Banc.

This is an action for damages. The cause was tried by the court and a jury, a verdict being rendered in favor of plaintiff. From a judgment entered thereon defendant appeals.

By stipulation of the parties one brief is submitted for five cases, namely: *Marks v. Twohy Bros. Co.* (this case); *Powell v. Twohy Bros. Co.*, *post*, p. 546 (194 Pac. 685); *Lafollett v. Twohy Bros. Co.*, *post*, p. 545 (194 Pac. 685); *Slayton v. Twohy Bros. Co.*, *post*, p. 535 (194 Pac. 682); and *Morgan v. Twohy Bros. Co.*, *post*, p. 547 (194 Pac. 686). The several cases arise out of the following facts, as substantially stated in the briefs:

In the year 1915 there was organized under the provisions of Chapter XIV, Title XLI, of Oregon Laws a municipal corporation in Crook County, Oregon, known as the Ochoco Irrigation District, the objects and purposes of which were to dam Ochoco Creek, a tributary of Crooked River, and thereby create a reservoir and impound therein the waters of Ochoco Creek, and distribute such waters through canals and ditches for irrigation purposes. At the time of the organization of the district there were in existence two irrigation ditches or canals which received their supply of water from Ochoco Creek, one known as the Table Land Ditch, sometimes referred to as Highline Ditch, and the other Combs-Slayton Ditch. The intake of the Table Land Ditch was about a mile upstream or east of the dam site, from which point the ditch followed the north bank of the creek until it reached a bench or table land north of Ochoco Creek, and thence was constructed along the bench and served the lands thereon with water. The intake of the Combs-Slayton Ditch was about one-half mile downstream from the dam site, from which point the ditch followed the low lands on the north side of Ochoco Creek and supplied such lands with water.

In 1918, and the year prior thereto, all of the plaintiffs were users of water for irrigation purposes from Ochoco Creek, all of them utilized what is known as the Table Land Ditch to convey water from Ochoco Creek to their irrigated lands, and three of the plaintiffs also used the Combs-Slayton Ditch for the purpose of conveying water to a portion of their irrigated lands. In cases where water was conveyed through both the Table Land Ditch and the Combs-Slayton Ditch, two causes of action are set forth in the complaint; but in the cases where water was used

through the Table Land Ditch, only one cause of action is stated. Except in this regard the pleadings in all of the cases are practically the same. The Ochoco Irrigation District entered into a contract with the defendant, whereby it agreed to perform the work and furnish the material necessary in the construction of the dam and canal for the district.

Seven cases were instituted against the defendant. In three of these, namely, *O'Neil v. Twohy Bros. Co.*, ante, p. 481 (190 Pac. 306), the Marks, and Powell cases, the owners of lands supplied by the Table Land Ditch alone are claiming damages to those lands. In one, the Cram & Cram case, the owner of lands was supplied by the Combs-Slayton Ditch alone. In the latter case the jury found a verdict in favor of the defendants. Three of the actions were by owners of land supplied by both the Table Land Ditch and the Combs-Slayton Ditch, in which two separate causes of action are stated in the complaint. These are the Lafollett, Slayton, and Morgan cases. The first causes of action in the three last-named cases were to recover damages to the lands supplied by the Table Land Ditch, caused by facts substantially the same as alleged in the O'Neil, Marks, and Powell cases. The first causes of action in the Lafollett, Slayton, and Morgan cases are the same, relating to the Table Land Ditch. The second causes of action set out in the complaint in the three last-named cases are to recover damages to lands supplied by the Combs-Slayton Ditch, and, as asserted in defendant's brief, were caused by the facts alleged practically the same as in the Cram & Cram case.

COMPLAINT IN THE MARKS CASE.

Plaintiff alleged the corporate character of the defendant, the organization of the irrigation district,

and the object and purposes thereof; the entering into the contract by the district with the defendant for the construction of the dam and canal; the preparation of plans therefor; the commencement and continuation of the work by defendants; and the plaintiff's ownership of certain lands in Crook County, semi-arid in character, but capable of producing agricultural crops when irrigated. Plaintiff further avers that he is the owner of a vested water right, dating from the year 1909, appurtenant to the lands, which water is taken from Ochoco Creek through a ditch known as the Table Land Ditch in sufficient quantity to properly irrigate all of his lands which are under cultivation, and since 1909, up to 1918, the plaintiff and his predecessors in interest have continually enjoyed and used such water right and have irrigated such lands and raised profitable crops thereon; that during the months of March, April, and May there was sufficient amount of water in Ochoco Creek to irrigate plaintiff's lands, and was necessary therefor; "and during all of said time the plaintiff had the right to the use of said ditch for the purpose of conveying water therein from said creek to his said lands for the purpose of irrigating the same and the crops thereon, and the defendant at that time had full notice and knowledge of plaintiff's said rights. Plaintiff then states:

"That in the prosecution of said work and the construction of said dam and canal leading therefrom it was unnecessary for the defendant to interrupt or prevent the flow of the water from said Ochoco Creek to the lands of the plaintiff during said months, but by using ordinary care and diligence the defendant could have prosecuted said work and constructed said dam and canal leading therefrom in such manner and at such time as to permit the water to be diverted from said Ochoco Creek and carried and conveyed to the lands of the plaintiff and used in irrigating his

lands either through the Table Land Ditch or by temporary flume constructed for such purpose, or by the completion of such portion of said canal below said dam as would have permitted said water to flow therein to the lands of the plaintiff, but the defendant failed to use ordinary care or diligence in the prosecution of said work or the construction of said dam or canal, and failed to do any of the things above specified, but, on the contrary, the defendant went upon said Table Land Ditch and tore up and destroyed the same, and failed to construct an adequate temporary flume, or to complete the necessary portion of said canal to permit the water to be diverted from said creek, and conveyed therein to the lands of the plaintiff for irrigating the same, and defendant willfully, purposely, carelessly, and unnecessarily in the performance of said work interfered with, interrupted, obstructed, and prevented the water in said creek from flowing to the lands of the plaintiff, and willfully, purposely, and unnecessarily obstructed the flow of said water to plaintiff's lands, and caused the same to flow elsewhere than upon the lands of the plaintiff, and appropriated and converted said water to the defendant's use, whereby said water was prevented from flowing to or upon the lands of the plaintiff, and the plaintiff thereby was deprived of the use thereof for irrigating his crops in said months of March, April, and May, 1918, whereby the crops upon plaintiff's land were rendered less abundant, and were stunted and retarded in their growth, and were damaged and injured and lessened in quantity and depreciated in quality, and were permanently injured and damaged, all to the loss, injury, and damage of the plaintiff in the sum of seventeen hundred dollars (\$1700)."

The defendant by its answer admitted the incorporation of defendant, the organization of the irrigation district with its objects and purposes, plaintiff's ownership of the land, and denied all the other material allegations of the complaint. It then set forth two

separate defenses, in effect, the organization of the irrigation district, its objects and purposes; that the lands of plaintiff are within the district; that there was no other way of conveying water to plaintiff's lands than through the Table Land Ditch. It then averred as follows:

"On November 21, 1917, the plaintiff, in consideration of the sum of \$10,000 paid by said Ochoco Irrigation District, made, executed and delivered to said Ochoco Irrigation District a deed of conveyance of all his right, title, and interest in and to said Table Ditch, which deed was witnessed by two witnesses, and was duly acknowledged by said plaintiff and the same was duly recorded at page 109 of Deed Book 40 of the Records of Crook County, Oregon; and thereupon said Ochoco Irrigation District entered upon and into possession of said Table Land Ditch and into possession of lands adjoining said Ochoco Creek, and after preparing plans therefor and submitting the same to the State Engineer of Oregon and securing his approval thereof, constructed a dam across said Ochoco Creek and across said Table Land Ditch, whereby the waters which had theretofore flowed in said river and in said ditch were dammed up and impounded and ceased to flow through the same, which said dam and the construction thereof is the same dam and construction referred to and complained of in the amended complaint."

Continuing, defendant asserted that the district employed it to construct the dam, and pursuant to such employment during the year 1917, defendant commenced the construction of the dam, and continued the same under the direction of the district until February, 1919; and that the defendant did the work in the manner and at the times provided and required by the contract between it and the district, except as to a change in the date of completion, May 1, 1918,

which was necessitated by the change in the plan of the work made by the district.

Defendant further averred that the district agreed to furnish plaintiff's lands with water through the new canal which was to be built, and that plaintiff at all times was aware that the Table Land Ditch was to be and was destroyed so the district's canal might be built upon the same location, and plaintiff acquiesced therein.

Plaintiff, by his reply, admits part of the allegations of the answer, and denies a part, asserting that the dam was constructed as alleged in plaintiff's complaint. He admits the execution of the deed mentioned in defendant's answer, and avers that the Table Land Ditch was constructed and owned by a partnership composed of plaintiff and other parties, each of whom owned individual rights to the waters of Ochoco Creek appurtenant to his lands, and each used the Table Land Ditch for the purpose of conveying water from Ochoco Creek to the point where each diverted water upon his lands, and that the partnership owned no water right. The gist of the reply in regard to the deed is that—

The "partnership conveyed to said Ochoco Irrigation District, the said Table Land Ditch above mentioned for a consideration of ten thousand dollars (\$10,000), and the further consideration hereinafter mentioned, and in and by the terms of said deed each member of said partnership and each grantor in said deed reserved his right to the waters of Ochoco Creek, which had been by him appropriated as hereinbefore alleged, and which were appurtenant to his respective lands, and as a part of the consideration for said deed said Ochoco Irrigation District orally agreed with each of the grantors in said deed (and particularly with the plaintiff) that said Table Land Ditch should be thereafter continuously maintained and used by

said district for the purpose of conveying the water appropriated by each of said grantors (including the plaintiff) in and through said ditch to the lands of each appropriator above mentioned (and including the lands of plaintiff mentioned in the complaint) and that the water appropriated by said grantors severally should be conveyed therein to the lands of each separate grantor until the irrigation works of said district should be constructed and completed; and that thereafter the lands of each grantor should be supplied by said irrigation district with water to the extent of the appropriation of each grantor, and the defendant well knew all of the terms and conditions above mentioned and the consideration for said deed as herein alleged, and the rights of the plaintiff at the time that the defendant entered into the contract with said Ochoco Irrigation District to construct said dam in Ochoco Creek, and well knew said terms and conditions and said consideration for said deed at and during all of the time that the defendant was performing work in the construction of said dam, and at the time that the defendant obstructed and interfered with the flow of the water in said district to the lands of plaintiff as alleged in the complaint of the plaintiff."

Defendant demurred to the reply on the ground that the alleged oral agreement was a variance and setting aside of the terms of the deed. Defendant also filed a motion for judgment on the pleadings because of the admissions in the reply that the deed had been given, and that what defendant had done was done as the servant, employee and contractor of the district, pursuant to the contract to build the dam and canal. The demurrer and motion were overruled. Plaintiffs by their conveyance, "bargain, sell, assign, set over, transfer and convey unto the said Ochoco Irrigation District, its successors and assigns, all our right, title and interest in and to that certain real property known and designated as the Table Land Ditch, and

all water rights, rights of way and easements owned by the said Table Land Ditch, and the Table Land Ditch Company, a partnership, comprised of the persons executing this conveyance, together with all branches, laterals and extensions thereof or connected thereto, under whatsoever name the same may be called or designated."

At the close of plaintiff's testimony defendant moved for a nonsuit. At the close of the case it requested the court to instruct the jury to return a verdict for the defendant. These motions were also overruled.

REVERSED.

For appellant there was a brief over the names of *Messrs. Malarkey, Seabrook & Dibble, Mr. James G. Wilson and Mr. G. L. Bernier*, with an oral argument by *Mr. E. B. Seabrook*.

For respondent there was a brief with oral arguments by *Mr. W. H. Wilson and Mr. N. G. Wallace*.

BEAN, J.—This court, in the case of *O'Neil v. Twohy Bros. Co.*, *ante*, p. 481 (190 Pac. 306), held that the trial court erred in overruling the demurrer, the motion for judgment on the pleadings, the motion for a nonsuit and the request for a directed verdict. The O'Neil case is now pending upon a petition for a rehearing, and we are earnestly requested to review again the questions decided by the opinion in that case. The issues in the O'Neil case are the same as those in the case of *Marks v. Twohy Bros. Co.*, now under consideration.

As we understand the record, there is no controversy in regard to the following facts, namely: The Ochoco Irrigation District employed the plaintiff to construct the dam across Ochoco Creek and to build

the main canal leading from the dam downstream. The first one and one-half miles of this main canal is located upon the exact site of the Table Land Ditch and upon a steep hillside, so that in order to construct the main canal the Table Land Ditch at this place must necessarily be destroyed. The several plaintiffs were the owners of the Table Land Ditch jointly, and each of them was individually the owner of a vested right to a certain quantity of water from Ochoco Creek appurtenant to his lands. They carried the water to their respective lands through their joint property, the Table Land Ditch. In view of the fact that the district's main canal could not be constructed without tearing up and destroying the Table Land Ditch, the district purchased from the plaintiffs in the several cases mentioned, the Table Land Ditch, and in consideration of the sum of \$10,000 a deed of conveyance was executed by the several plaintiffs to the Ochoco Irrigation District, conveying to it the title in fee to the Table Land Ditch with covenant of warranty of the title of the ditch to the district. In the deed the several plaintiffs reserved to themselves their several individual water rights appurtenant to their respective lands. The reservation clause in the deed appears as follows:

"This conveyance does not cover any water rights owned by the individuals making this conveyance nor to any water right appurtenant to their individual lands."

The complaint of plaintiff Marks is based upon the right to use the Table Land Ditch during the season of 1918, for the purpose of conveying the water, to which he had a right, upon his lands. It will be noticed that plaintiff alleges that during all of that season there was a sufficient supply of water in

Ochoco Creek to irrigate plaintiff's lands and crops during the months of March, April, and May, and that during all of that time plaintiff had the right to the use of such ditch for the purpose of conveying water from the creek to his lands for irrigation.

If the conveyance of the Table Land Ditch by the several plaintiffs to the Ochoco Irrigation District transferred all of the right, title, and interest of the plaintiffs in that ditch, of course the claim of plaintiff, as made in his complaint, cannot be sustained. Or, as stated in the brief of plaintiffs:

"The effect of this deed is the principal question raised upon this appeal in the causes of action involving the right of the several plaintiffs to flow water through the Table Land Ditch."

The validity of the deed is not in question. It is complete upon its face. No ambiguity of the instrument is suggested or apparent. It may be stated that we are not dealing with a collateral agreement of the parties which does not affect the conveyance, nor with a question of fraud, accident or mistake.

Admitting the execution of the deed from the plaintiffs to the district, in order to overcome the force of the conveyance plaintiff asserts that—

"As a part of the consideration for said land said Ochoco Irrigation District orally agreed with each of the grantors in said deed (and particularly with the plaintiff) that said Table Land Ditch should be thereafter continuously maintained and used by said district for the purpose of conveying the water appropriated by each of said grantors (including the plaintiff) in and through said ditch to the lands of each appropriator above mentioned (and including the lands of plaintiff mentioned in the complaint), and that the water appropriated by said grantors severally should be conveyed therein to the lands of each

separate grantor until the irrigation works of said district should be constructed and completed."

It is maintained by the defendant that the deed pleaded in its answer and introduced in evidence cannot be varied, contradicted, enlarged, or diminished by parol. It is the contention of plaintiffs that as the written instrument recites a monetary consideration, only oral testimony is admissible to show the true consideration.

1. The consideration mentioned in the deed is \$10,000. The additional consideration pleaded in plaintiff's reply, and sought to be shown by oral evidence, is an executory or contractual consideration, in effect an additional reservation of the right to the use of the Table Land Ditch by plaintiffs. We quote Section 713, Or. L., in full:

"When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be, between the parties and their representatives or successors in interest, no evidence of the terms of the agreement, other than the contents of the writing, except in the following cases:—

"1. Where a mistake or imperfection of the writing is put in issue by the pleadings;

"2. Where the validity of the agreement is the fact in dispute. But this section does not exclude other evidence of the circumstances under which the agreement was made, or to which it relates, as defined in Section 717, or to explain an ambiguity, intrinsic or extrinsic, or to establish illegality or fraud. The term 'agreement' includes deeds and wills as well as contracts between parties."

Section 798, Or. L., as far as pertinent, reads thus:

"The following presumptions, and no others, are deemed conclusive: • •

"3. The truth of the facts recited from the recital in a written instrument, between the parties thereto,

their representatives or successors in interest by a subsequent title; but this rule does not apply to the recital of a consideration; * * . ”

It is a well-established rule of the common law, which has been embodied in the statutes of a number of the states, including Oregon, that when any grant or other disposition of property, or any contract, agreement, or undertaking has been reduced to writing, and is evidenced by a document, such document cannot be contradicted, altered, added to, or varied by parol or extrinsic evidence. The rule is founded on the long experience that written evidence is so much more certain and accurate than that which is based on memory only that it would be unsafe, when the parties have expressed the terms of their agreement in writing, to admit weaker evidence to control and vary the stronger, and thereby show that the parties intended a different contract from that expressed in the written memorial signed by them. It is obvious that but for the rule, written instruments would soon come to be of little value if their explicit provisions could be varied, controlled, or superseded by parol evidence, and it is plain that a different rule would greatly increase the temptations to commit perjury. According to the modern and better view, the rule which prohibits the modification of a written contract by parol is one not of evidence merely but of substantive law: 22 C. J., p. 1070, § 1380.

2. As indicated by our statute, the rule has its exceptions. A recital in a written instrument as to the payment of the consideration is in the nature of a receipt. As a general proposition, the rule excluding parol or extrinsic evidence to vary or contradict written instruments does not apply to mere receipts,

which are usually general in their expressions; but these may be contradicted, varied, or explained. The rule that parol evidence is admissible to explain or contradict receipts applies to all writings which are in the nature of receipts, even though they might not technically be termed such: C. J., p. 1135, § 1520, and p. 1137, § 1521.

3, 4. A recital in a written instrument as to the payment of the consideration is merely in the nature of a receipt, and may be contradicted or explained by parol or extrinsic evidence, unless such contradiction would have the effect of rendering nugatory some substantial and contractual provision of a valid written instrument. In the case of a conveyance like the one under consideration from plaintiffs to the Ochoco Irrigation District, where the grantors, or one claiming under them, attempt by contradicting the consideration clause, to defeat the operation of the deed, or to lessen the force or effect thereof, or to incorporate therein a reservation of a right or interest in the property conveyed, which reservation is not enumerated in the conveyance, such parol or extrinsic evidence is inadmissible to vary, contradict, enlarge or diminish such deed: *Finlayson v. Finlayson*, 17 Or. 347, 354 (21 Pac. 57, 11 Am. St. Rep. 836, 3 L. R. A. 801); *Sutherlin v. Bloomer*, 50 Or. 398 (93 Pac. 135); *Douglas County Bank v. Bloomer*, 50 Or. 561 (93 Pac. 141); *Oregon Mill Co. v. Kirkpatrick*, 66 Or. 21 (133 Pac. 69); *Muir v. Morris*, 80 Or. 378 (154 Pac. 117, 157 Pac. 785); *Elliott Contracting Co. v. City of Portland*, 88 Or. 150 (171 Pac. 760); *Blake-McFall Co. v. Wilson*, *post*, p. 626 (193 Pac. 902); 22 C. J., p. 1167, § 1562. Upon this point the rule is stated thus in 22 C. J., § 1566:

“Where the effect of parol evidence contradicting the consideration expressed in the instrument or showing the true consideration to be different therefrom would be to change or defeat the legal operation and effect of the instrument, or to add new matter to an agreement complete upon its face, the evidence is not admissible; for in such case it comes within the rule which forbids the introduction of parol evidence to vary, contradict, or defeat a written instrument, and not within the exception to that rule that parol evidence is admissible for the purpose of contradicting or showing that the true consideration is other and different from that expressed in the writing.”

5. The considerations recited in the conveyance in question are monetary on the one side and contractual on the other. The consideration moving from the grantee to the grantors is purely monetary. That moving from the grantors to the grantee is contractual; it is a conveyance of all the right, title, and interest of the grantors in the Table Land Ditch. If the grantors, under the guise of varying the monetary consideration, can ingraft new terms into the instrument by parol evidence, and reserve to themselves the right to the use of the Table Land Ditch during the season of 1918, they could in the same manner reserve to themselves the right to its use for a longer period of five or fifty years, or defeat the purpose of the conveyance.

6. Stated in general terms, a purely money consideration, mentioned in a written instrument, which is complete upon its face, cannot be amplified by parol evidence so as to ingraft into the instrument an additional executory or contractual consideration. Where the written instrument appears to be perfect and complete, the terms of a contractual consideration cannot be contradicted or varied by parol: *Vulcan Iron Works Co. v. Roquemore*, 175 Fed. 11 (99 C. C. A.

77); *Leftkovitz v. Gadsden First Nat. Bank*, 152 Ala. 521, 529 (44 South. 613); *Ashley etc. R. Co. v. Cunningham*, 129 Ark. 346 (196 S. W. 798); *Harding v. Robinson*, 175 Cal. 534 (166 Pac. 808); *Brosseau v. Jacobs' Pharmacy Co.*, 147 Ga. 185 (93 S. E. 293); *Romono Oolitic Stone Co. v. Missouri Valley Bridge etc. Co.*, 173 Ill. App. 534; *Indianapolis Union Ry. Co. v. Houlihan*, 157 Ind. 494 (60 N. E. 943, 54 L. R. A. 787); *Slump v. Blain*, 177 Iowa, 239 (158 N. W. 491); *Trice v. Yoeman*, 60 Kan. 742 (57 Pac. 955); *Egan v. Hotel Grunewald Co.*, 134 La. 739 (64 S. W. 698); *Chaplin v. Gerald*, 104 Me. 187 (71 Atl. 712); *Farquhar v. Farquhar*, 194 Mass. 400 (80 N. E. 654). As more fully stated in 22 C. J., page 1171, Section 1569:

“Where the statement in a written instrument as to the consideration is more than a mere statement of fact or acknowledgment of payment of money consideration, and is of a contractual nature, as where the consideration consists of a specific and direct promise by one of the parties to do certain things, this part of the contract can no more be changed or modified by parol or extrinsic evidence than any other part, for a party has the right to make the consideration of his agreement of the essence of the contract, and when this is done the provision as to the consideration for the contract must stand upon the same plane as the other provisions of the contract with reference to conclusiveness and immunity from attack by parol or extrinsic evidence. For the same reason, where the writing is complete upon its face, an additional executory consideration cannot be shown by parol, or, as it is sometimes expressed, new terms cannot be engrafted into an agreement by parol under the guise of varying the consideration.”

Undoubtedly for some purposes parol evidence may be introduced to explain or amplify the consideration

mentioned in a written instrument. However, this exception to the general rule will not permit proof of an oral agreement for the purpose of imposing an affirmative obligation on one of the parties to the written memorandum of which there is no indication or suggestion in the writing. If such evidence were permitted to be introduced on the theory of an inquiry into the consideration of the conveyance, it is obvious that the rule respecting the finality of written contracts would be abrogated: *Watkins Salt Co. v. Mulkey*, 225 Fed. 739, 744 (141 C. C. A. 11). This was plainly announced in *Howe v. Walker*, 4 Gray (70 Mass.), 318, when the court speaking through Mr. Justice THOMAS said:

“Nor can you, under the guise of proving by parol the consideration of a written contract, add to or take from the other provisions of the written instrument. This would practically dispense * * with that sound rule of the common law, which finds in the written contract the exclusive and conclusive evidence of the intent and agreement of the parties, and will not suffer such written contract to be varied or affected by any contemporaneous parol agreement.”

In *Castleman-Blackmore Co. v. Pickeral etc. Co.*, 163 Ky. 750, 758 (174 S. W. 749), it is said:

“The rule that oral evidence is admissible to vary the consideration, stated in a written contract, should not be extended to include every motive that prompts the making of a contract. Here the alleged undertaking on the part of the defendant, though related in a way to the consideration, was purely contractual in its character, and cannot be regarded as a part of the consideration within the meaning of the rule relied on. Where a contract is valid and complete in itself parol evidence of other terms should not be permitted under the mere guise of showing consideration.”

Any discordant notes which may have been sounded are but evasions of the rule herein applied. The rule still stands, and is almost universally recognized: See note to *Green v. Batson*, 5 Am. St. Rep. 194, at page 201.

7. Parol evidence, to show an entire absence or a partial or total failure of consideration, is not within the rule which excludes such evidence to vary or contradict the terms of a written contract: 10 R. C. L., p. 1052, § 247.

The case of *Houston v. Greiner*, 73 Or. 304 (144 Pac. 133), comes within the principle last announced. This case is claimed by counsel for plaintiff to be contrary to the ruling announced in *O'Neil v. Twohy Bros. Co.*, ante, p. 481 (190 Pac. 306), and herein *Houston v. Greiner* was a suit to set aside a deed, upon the grounds: (1) Failure of consideration; (2) mental incapacity of the grantor; (3) undue influence and coercion. Fraud on the part of the grantee was set forth in the complaint, as appears from an examination of the record in the case. The suit was decided upon the first point mentioned. There was no money consideration passed for the deed sought to be set aside. It was executed in consideration of an agreement for maintenance. The validity of the deed was in dispute. The question involved came squarely within the exception mentioned in subdivision (2) of Section 713, Or. L., as well as the rule above stated in regard to the admissibility of parol evidence to show an absence or failure of consideration for a contract. The opinion in that case is not in conflict with the rule in *O'Neil v. Twohy Bros. Co.*, ante, p. 481 (190 Pac. 306), and in the present case. The announcements of this court in regard to the question under consideration in the case

at bar are in consonance with the overwhelming authority of precedents in other states.

It is plain from all of the circumstances of the case that it was the plan of the irrigation district, which was organized in the interest of the plaintiffs, to change the irrigation system then employed by the several plaintiffs, and to erect a dam across Ochoco Creek and construct a canal leading therefrom, a portion of which was on the site of the Table Land Ditch. In order to do this it was absolutely necessary to destroy the Table Land Ditch. That was the reason of the purchase of the ditch and the execution of the conveyance mentioned. Plaintiffs by their suits, in so far as the same pertain to the Table Land Ditch, are seeking to nullify the effect of their conveyance.

8. Doubtless by means of the reservoir created by the construction of the dam, the use by the plaintiffs of the water from the creek, the right to which they reserved in the conveyance of the ditch, would be extended later in the irrigation season and increased by their arrangement with the district. It is not an uncommon thing for water which has been regularly appropriated and used for purposes of irrigation to be conveyed in a ditch or canal other than the one in which it is at first appropriated and conveyed. It is not claimed, as we understand, that the water rights and the right to the use of the Table Land Ditch could not be separated and the ditch sold and conveyed separately without the water rights changing ownership. Plaintiffs cannot part with the ownership of their ditch and also keep it. The fact that there was no other means of conveying water to their lands during the time of the construction of the district canal does not change the legal effect of the deed.

9. It is argued by counsel for plaintiff that the reservation of the water right in the deed carried with it the right to the use of the ditch for the purpose of conveying the water to plaintiff's land; but this cannot be conceded. Under the circumstances of this case, if under any, the ditch cannot be said to be appurtenant to the water or water right.

10. Where a person enters upon property under the right, authority and orders of another, as the defendant asserts it entered upon the Table Land Ditch under the authority of the Ochoco Irrigation District, and in an action against defendant, Twohy Bros. Company, by plaintiff for trespass it justifies under the district, it becomes a question as to whose right and title is the better, that of plaintiff or that of the irrigation district, under the orders and authority of which the entry was made. If the irrigation district's title is the better, entry under its authority is a complete defense; *Logan v. Vernon & Co.*, 90 Ind. 552; *Gault v. Jenkins*, 12 Wend. (N. Y.) 488; *Danforth v. Briggs*, 89 Me. 316 (36 Atl. 452); *Goetchins v. Sanborn*, 46 Mich. 330 (9 N. W. 437); *Carrier v. Carrier*, 85 Conn. 203 (82 Atl. 187).

We see no necessity of alluding to the statute of frauds, or the right of eminent domain, which are referred to in the briefs.

It follows that the causes of action pertaining to the Table Land Ditch cannot be maintained. The trial court erred in overruling the demurrer to the reply, and denying the motion for judgment on the pleadings, and the motion for nonsuit in the present case of *Marks v. Twohy Bros. Co.*

The judgment of the lower court will therefore be reversed.

REVERSED.

Mr. Justice McBRIDE did not sit in this case.

Argued at Pendleton October 26, 1920, reversed January 11, 1921.

SLAYTON v. TWOHY BROS. CO.

(194 Pac. 682.)

Appeal and Error—Verdict Held to have Been Based on Insufficient Cause of Action.

1. Where numerous cases were consolidated for trial, all of them involving a cause of action for interference with one ditch and some of them involving also a second cause of action for interference with another ditch, and the jury reported that it found for the plaintiffs as to interference with the first ditch, but for defendant as to interference with the second ditch, but, after being instructed by the judge to return only one verdict either for plaintiff or defendant in each case, they returned a verdict for plaintiff in each case, it was manifest they found for defendants on the second cause of action, so that on deciding that first cause of action was insufficient, second cause will not be considered, it being analogous to moot case, but judgment will be reversed.

Waters and Watercourses—Irrigation District Contract Held not to Prevent Destruction of Existing Ditch.

2. A provision in an irrigation district contract, requiring the contractor to protect from injury existing property except in so far as the work required its modification or removal, does not require the contractor to protect the rights of the former owners of a ditch to convey water for irrigation of their lands through the ditch, where they conveyed the ditch to the district for the purpose of enabling the district to construct its canal along the line of the ditch.

From Crook: JAMES U. CAMPBELL, Judge.

In Banc.

Plaintiff brings action against Twohy Bros. Company, a corporation, for damages. Upon the trial a verdict and judgment thereon were rendered in favor of plaintiff, from which judgment defendant appeals.

REVERSED.

For appellant there was a brief over the names of *Messrs. Malarkey, Seabrook & Dibble, Mr. James S. Wilson and Mr. G. L. Bernier*, with an oral argument by *Mr. E. B. Seabrook*.

For respondent there was a brief with oral arguments by *Mr. W. H. Wilson* and *Mr. N. G. Wallace*.

BEAN, J.—The complaint contains two causes of action. In the first cause of action the facts are in effect identical with those in the case of *Marks v. Twohy Bros. Co.*, *ante*, p. 514 (194 Pac. 675), in which an opinion was rendered on this date, and also identical with those in the case of *O'Neil v. Twohy Bros. Co.*, *ante*, p. 481 (190 Pac. 306), except as to the amount of damages claimed. The opinions in the two cases named govern the case at bar, as to the first cause of action. The judgment must therefore be reversed.

At the time of the argument of the five cases, which were mentioned in the opinion in *Marks v. Twohy Bros. Co.*, it was urged by counsel for plaintiff that defendant was culpably negligent, and trespassed upon the rights of plaintiff by using water from the Table Land Ditch to carry on hydraulic work of washing earth and material into the dam being constructed across Ochoco Creek. Defendant asserts that any water so used was under the direction of the Ochoco Irrigation District, made through its superintendent of the work and under his direction and with the consent and acquiescence of the several plaintiffs. As we understand the plaintiff's complaint and the record in the several cases, this was not a material item, nor taken into consideration by the jury in the trial of the cases.

The real complaint of plaintiffs seems to be that the company did not complete the irrigation system in time for irrigation during the season of 1918. It is not claimed, as we understand, that the construction was not done within the time provided for in the

written contract between defendant and the district. It is claimed that there was a prior or contemporaneous oral agreement that a certain portion of the work should be done so that plaintiffs could pass the water for irrigation by April 1, 1918, a month earlier than the date originally fixed by the contract.

In order to show the theory upon which the cases were tried, we refer at length to the instructions given to the jury by the learned trial judge, to which there was no objection on the part of plaintiffs. We do this in order to make it clear that practically the whole of the causes of action pertaining to the Table Land Ditch depend upon the question of the right to the use of that ditch, which is discussed in the opinion in *O'Neil v. Twohy Bros. Co.*, and that in *Marks v. Twohy Bros. Co.* In the six cases which were tried together the trial court instructed the jury as to the issues of law in the case of *Marks v. Twohy Bros. Co.*, and charged the jury that the instructions just given them in that case were all applicable to the case of *Powell v. Twohy Bros. Co.*, *post*, p. 546 (194 Pac. 685), except as to the amount of damages claimed. The trial court then explained the issues, and instructed the jury in the case of *Cram & Cram v. Twohy Bros. Co.*, which pertains to the Combs-Slayton Ditch, charging *inter alia*:

"So that the plaintiffs who have land under what is known as the Combs-Slayton Ditch can only recover if the work done by the defendant, Twohy Bros. Company, a corporation, was done in a careless and negligent manner, as alleged in the complaint, and not otherwise. That is, if you find from a preponderance of the evidence that when the dam across said Ochoco Creek was closed, there was a provision made for the taking of water through said dam by means of a canal and the spilling of the same into Ochoco Creek below said dam, so the same might pass

down said creek to the headgate of said Combs-Slayton ditch, you cannot find defendant liable in this action for any failure or shortage of water in said Combs-Slayton ditch, providing that the spillway was made and the water caused to go through that spillway."

The court also charged the jury that the instructions given in the Marks case were applicable to plaintiff's first cause of action in *Morgan v. Twohy Bros. Co.*, *post*, p. 547 (194 Pac. 686), that the instructions given in the Cram case were all applicable to plaintiff's second cause of action in the *Morgan v. Twohy Bros. Co.*, case; and that the same was true of the case of *Slayton v. Twohy Bros. Co.*

As showing, among other things, that the cases were tried in regard to the Table Land Ditch as though they depended upon the right of plaintiffs to the use of that ditch, we quote from the charge of the court in the Marks case as follows:

"It is essential to plaintiff's case that plaintiff show a right to the use of Table Land Ditch to carry water through to his lands. If plaintiff had no right to carry water through said Table Land Ditch, he cannot recover for any injury resulting from the destruction of said ditch.

"If you find from a preponderance of the evidence that plaintiff had an agreement with said district for water to be delivered from the reservoir created by the construction of said dam, such agreement would constitute an acquiescence and consent by plaintiff to the construction of said dam and impounding the waters of Ochoco Creek."

For a second cause of action plaintiff Slayton and plaintiff Morgan and plaintiff Lafollett allege, in effect, after adopting the formal paragraphs 1 to 4 of the first cause of action, that they are the

owners of certain lands, and vested water right appurtenant thereto in the waters of Ochoco Creek; that the dam across Ochoco Creek is at a point above the head of the Combs-Slayton Ditch where they divert water for use upon their lands. They then aver, much in the same form as in the first cause of action, that the defendant in the construction of the dam unnecessarily interfered with and interrupted the flow of water from Ochoco Creek to the lands of plaintiff during the months of March, April, May, and June, 1918; that they were thereby prevented from using such water through the Combs-Slayton Ditch; that by completing the canal a sufficient distance below the dam for water to pass to the Combs-Slayton Ditch, or by providing other means for conveying such water to plaintiffs' lands they could easily have permitted the water so to be diverted, which they unnecessarily failed to do or to provide other means for conveying such water, and willfully and purposely obstructed the flow of water to plaintiffs' lands, and appropriated said water to defendant's use and plaintiffs' damage.

Issues were raised by the answer of defendant. Defendant avers, in substance, the organization and purpose of the district, and then as follows:

“Par. IV.

“During the years 1916 and 1917 said Ochoco Irrigation District for the purpose of erecting and maintaining a dam across the Ochoco Creek to impound all the waters thereof entered upon and appropriated lands on both sides of said creek at and adjoining the place where the dam referred to in the amended complaint is being constructed, and entered upon and appropriated all of the water and water rights in said Ochoco Creek, including any rights owned by plaintiff therein, and in the year 1917, after preparing plans therefor and submitting the same to the

State Engineer of Oregon and securing his approval thereof commenced the construction of a dam across said Ochoco Creek and continued the construction thereof, up to the present time, and is now continuing such construction."

That plaintiff consented to and acquiesced in the construction of the dam and the impounding and taking by the district of all the water of the creek above the headgate of the Combs-Slayton Ditch. That the district employed defendant to perform the work of construction of the dam, and pursuant thereto the defendant under the license, orders, and direction of the Ochoco Irrigation District commenced the construction of the dam after June 1, 1917, and actively continued the construction thereof until September, 1919, and that—

"In constructing said dam a channel or cut was left open through the same for the passage of the waters of said creek, and the waters of said creek did flow through the same undiminished to the headgate of the Combs-Slayton Ditch until about May 13, 1919, at which time the said District ordered and required defendant to close said channel or cut, which defendant did then pursuant to said order and requirement in the manner and at the time so ordered and required, whereby the waters of said creek were impounded by said dam and ceased to flow in the former bed of said creek below said dam."

Defendant further avers that the plaintiffs, prior to January 1, 1918, entered into an agreement with the district for the district to deliver water to the land of plaintiffs from the waters impounded by the construction of the dam, and that the district, pursuant to such agreement, proceeded to take possession of the waters and after preparing plans commenced and continued the construction of said dam.

Plaintiff filed a reply, putting in issue the substance of the new matter of the answer to the second cause of action, except as to paragraph 4.

It appears from the record that about May 1, 1918, a temporary flume was constructed along the line of the old Table Land Ditch, commencing about 1,000 feet below the dam where the Table Land Ditch was partly torn up so that the same would not convey water. This was done in order that water might pass through the same, and a chute or spillway was constructed so that the water could be emptied into Ochoco Creek, and be taken into the Combs-Slayton Ditch for the use of these plaintiffs. The use of the water by these plaintiffs until May 3, 1918, is explained in the evidence hereafter quoted, which is also referred to in order that the matter may be fully understood in regard to the tearing up of the Table Land Ditch. We find at page 26 et seq. of the transcript of evidence, the testimony of R. W. Ray, a witness for plaintiffs, who was the engineer for the district, and who was acquainted with the arrangement between the district and the contractor and the carrying out of the same, and who supervised the construction work. On the cross-examination he testified as follows:

"Q. So up to May 3d the Combs-Slayton ditch users had the full creek, didn't they?

"A. Yes. * *

"Q. You say after May 3d the Combs-Slayton ditch was supplied with water from the Table Land Ditch by spilling it through this spillway you say you constructed?

"A. Yes, that and the drain from the sluicing operations.

"Q. So the water which was taken out of the Table Land Ditch by the sluicing operations went to the benefit of the Combs-Slayton ditch?

"A. Presumably so.

"Q. After the district got this deed to the Table Land Ditch, you spoke of an agreement that the owners of the Table Land Ditch had with the district in respect to keeping water flowing to their lands. I will ask you if there was any agreement between the owners of the Table Land Ditch and the district that the Table Land Ditch was to be kept intact after that deed was given?

"A. No.

"Q. Wasn't it the understanding, Mr. Rea, that that Table Land Ditch was to be torn up and a new canal built in its place?

"A. Yes; at times it must necessarily be torn up in order to carry on the construction work, and it would be impassable, you might say, to water, to all intents and purposes torn up.

"Q. Now, everybody understood that?

"A. Oh, yes.

"Q. When the deed was given?

"A. Oh, yes; it was understood.

"Q. And was not that the object that the deed was given to the district, so that they could go on the Table Land Ditch and tear it up and build this new canal in its place?

"A. Yes.

"Q. As a matter of fact, Mr. Rea, the grievance that the owners of the Table Land Ditch have been expressing was that the new canal was not built within the time they expected to have it done; wasn't that it?

"A. I think so. * *

"Q. After the deed was given there was never any understanding that they would ever get any more water through the Table Land Ditch?

"A. No.

"Q. It was to come through the new canal?

"A. Yes."

The witness further stated that he never denied Twohy Bros. Company the use of water for hydraulic work. On redirect examination the witness stated

that the Table Land Ditch was to be torn up as the work progressed at such time and in such manner as would not interfere with irrigation.

1. After the trial of the cases and having instructed the jury, Judge CAMPBELL, who presided during the trial, returned to his home and Hon. T. E. J. DUFFY received the verdict. It appears from the record that after deliberation the jury returned to the courtroom and submitted what the then presiding judge said "might be called two verdicts." While suggestions were made by counsel in regard to the verdict, the jury retired temporarily, and it appears from the remarks of counsel and of the court that the jury found the plaintiffs on the Table Land Ditch were damaged, and plaintiffs on the Combs-Slayton Ditch were not damaged. The court ruled that but one verdict should be rendered in a case, whether for plaintiff or defendant, regardless of the number of causes of action. After the jury returned to the courtroom the court informed the jury that the "verdict in the case of *Lafollett v. Twohy Bros. Co.*, and the verdict in the case of *Morgan v. Twohy Bros. Co.*, and the verdict in the case of *Slayton v. Twohy Bros. Co.*," were in such form that the court could not receive them, and that they must return a verdict for one party or the other. The jury retired for further deliberation, but returned again to the courtroom for further instruction as to their verdict, when the foreman said to the court, among other things:

"Your Honor, may we be permitted to write which cause of action we find our verdict on?"

One of the jurors said:

"Your Honor, Judge CAMPBELL in giving us our instructions, instructed us first on the Marks case and

then on the Cram case. There were two separate instructions, and it would appear as though we find these same causes opposite each other in these three cases. Now, we don't know how to bring in our verdict so our meaning will be clear. We have reached a verdict but we cannot transmit our meaning to you."

The court directed the jury that, if they found for the plaintiffs, to sign a verdict for the plaintiffs, that it did not make any difference how many causes of action there were, there should be one verdict, or if they found for the defendant there should be one verdict. Afterwards the jury returned a verdict for the plaintiffs in the five cases now under consideration, but the verdict does not show upon which cause of action the verdict was based, in the cases wherein there were two causes of action. Therefore, while it is plain from the record as to the determination reached by the jury regarding the causes of action pertaining to the Combs-Slayton Ditch, the verdicts in these cases do not express which causes of action the same were based upon.

It therefore seems to us that any discussion of legal questions pertaining to the second causes of action would be analogous to the consideration of a moot question, the facts in relation to the second causes of action having in reality been passed upon by a jury in favor of defendant.

2. It is contended on behalf of these plaintiffs that the defendant by its contract with the district "agreed to protect all property rights of others." We are referred to paragraph 53 of that document, which reads thus:

"PROTECTION FOR EXISTING STRUCTURES.—The Contractor shall carefully protect from injury any existing buildings, foundations, fills, land, pavements,

pipes, conduits, sewers, drains, cisterns, wells, railway tracks or other works, property or structures that may be liable to injury by the work covered by this Contract, except in so far as the work of the Contract requires their modification or removal. He shall take all precautions necessary for such protection, and shall be fully responsible for, and shall make good, any injury to such works, property or structures that may occur by reason of his operations."

It is only necessary to read this stipulation to discover that it does not change the liability of the defendant to the plaintiffs, in regard to any of the issues in the cases under consideration. Under the circumstances of these cases it cannot be inferred that the Table Land Ditch could be torn up and reconstructed, according to the contract, without requiring the modification of the ditch. Nor can we conclude that the work of building a dam across Ochoco Creek could be accomplished without necessarily interrupting the flow of water in the creek.

The judgment in the present case of *Slayton v. Twohy Bros. Co.* is reversed. **REVERSED.**

Mr. Justice McBRIDE did not sit in this case.

Argued at Pendleton October 26, 1920, reversed January 11, 1921.

LAFOLLETT v. TWOHY BROS. CO.

(194 Pac. 685.)

From Crook: JAMES U. CAMPBELL, Judge.

In Banc.

This is an action by T. H. Lafollett against Twohy Bros. Company for damages in the sum of \$6,550. Upon a trial by the court and a jury, a verdict was

rendered in favor of plaintiff for the sum of \$3,000. From a consequent judgment, defendant appeals.

REVERSED.

For appellant there was a brief over the names of *Messrs. Malarkey, Seabrook & Dibble, Mr. James G. Wilson* and *Mr. G. L. Bernier*, with an oral argument by *Mr. E. B. Seabrook*.

For respondent there was a brief with oral arguments by *Mr. W. H. Wilson* and *Mr. N. G. Wallace*.

BEAN, J.—The complaint contains two causes of action practically identical with those in the case of *Slayton v. Twohy Bros. Co.*, *ante*, p. 535 (194 Pac. 682), the first cause of action being practically the same as that involved in the case of *Marks v. Twohy Bros. Co.*, *ante*, p. 514 (194 Pac. 675). The case is governed by the opinions, this day rendered, in the two cases mentioned.

The judgment of the lower court will therefore be reversed.

REVERSED.

Mr. Justice McBRIDE did not sit in this case.

Argued at Pendleton October 20, 1920, reversed January 11, 1921.

POWELL v. TWOHY BROS. CO.

(194 Pac. 685.)

From Crook: JAMES U. CAMPBELL, Judge.

In Banc.

This is an action by Powell & Powell against Twohy Bros. Company to recover damages in the sum of

\$1,800. From a judgment on a verdict favorable to plaintiffs in the sum of \$1,000, defendant appeals.

REVERSED.

For appellant there was a brief over the names of *Messrs. Malarkey, Seabrook & Dibble, Mr. James G. Wilson* and *Mr. G. L. Bernier*, with an oral argument by *Mr. E. B. Seabrook*.

For respondents there was a brief with oral arguments by *Mr. W. H. Wilson* and *Mr. N. G. Wallace*.

BEAN, J.—The points involved are in effect the same as in the case of *Marks v. Twohy Bros. Co.*, *ante*, p. 514 (194 Pac. 675). The complaint contains one cause of action pertaining to the use of the Table Land Ditch, mentioned in that opinion.

The judgment of the lower court will therefore be reversed.

REVERSED.

Mr. Justice McBRIDE did not sit in this case.

Argued at Pendleton October 26, 1920, reversed January 11, 1921.

MORGAN v. TWOHY BROS. CO.

(194 Pac. 686.)

From Crook: JAMES U. CAMPBELL, Judge.

In Banc.

This is an action for damages in the sum of \$6,550. A trial resulted in a judgment upon a verdict in favor of plaintiffs in the sum of \$3,000. Defendant appeals.

REVERSED.

For appellant there was a brief over the names of *Messrs. Malarkey, Seabrook & Dibble, Mr. James G. Wilson and Mr. G. L. Bernier*, with an oral argument by *Mr. E. B. Seabrook*.

For respondents there was a brief with oral arguments by *Mr. W. H. Wilson and Mr. N. G. Wallace*.

BEAN, J.—The complaint contains two causes of action practically identical with those in the case of *Slayton v. Twohy Bros. Co.*, *ante*, p. 535 (194 Pac. 682). The first cause of action is practically the same as that involved in the case of *Marks v. Twohy Bros. Co.*, *ante*, p. 514 (194 Pac. 675). The case is governed by the opinions, this day rendered, in the two cases mentioned.

The judgment of the lower court will therefore be reversed.

REVERSED.

Mr. Justice McBRIDE did not sit in this case.

Argued November 24, 1920, affirmed January 11, 1921.

BOWERS v. BOWERS.

(194 Pac. 697.)

Divorce—Matters Held not “Personal Indignities Rendering Life Burdensome.”

1. Neglect of home premises, failure to supply literature, complaints of expense of dinner parties, and the like, do not amount to “personal indignities rendering life burdensome” within the meaning of the divorce statute.

Divorce—Not Granted for Mere Incompatibility.

2. Under the statute as to indignities, annulment of marriage relation is not to be granted for mere incompatibility of temper or uncongenial disposition, but the conduct of the offending spouse must be such as to threaten personal or mental injury to the one

1. On failure to entertain wife or unsociability as grounds for divorce, see note in 51 L. R. A. (N. S.) 460.

complaining, rendering it unsafe for the latter if the marriage relation is continued.

Divorce—Allegations as to Adultery must be Supported by More Than Mere Innuendo or Suspicion.

3. An allegation as to adultery of spouse in an action for divorce must be supported by more than mere innuendo or suspicion.

Divorce—Denial of on Ground of Loathsome Disease Held Proper.

4. In an action for divorce on the ground of defendant's syphilis, held, that the court properly denied relief under the evidence.

From Jackson: JAMES W. HAMILTON, Judge.

Department 1.

In this suit for divorce the plaintiff wife makes various charges against her husband which she denominates cruel and inhuman treatment. She says that he failed to keep his prenuptial promise that they should have a separate home and that she should not be burdened with the care of his four children by a former marriage, but that, on the contrary, he compelled her to take up her residence near Ashland, Oregon, in a home he had bought in the name of his said children and which was occupied by them, a widowed sister, and an uncle of the defendant. She complains of the responsibility and care thrust upon her on account of the children, want of help, and petty annoyances at the hands of the sister, all of which the defendant did nothing to prevent. Other grievances to which she gives utterance in the complaint consist of the defendant's failure to keep the dwelling and grounds in good order and repair and suitably furnished, so that she was compelled to varnish the furniture, care for the lawn, and do other manual labor in caring for the premises. She says, too, that over her protest that she believed a man employed by the defendant had broken into the house and was therefore objectionable to her, the defendant disregarded her wishes and employed the man. The defendant is

accused of stopping her credit at the meat market, so that on one occasion she was embarrassed by being denied credit in the presence of a friend. According to the complaint, the defendant was at fault in not supplying the plaintiff with current magazines and in complaining that she did not make up his bed, although she was worn out with days and nights of watching over their sick child. He also set up in the living-room a heating stove which was objectionable to her; and for weeks at a time he would not speak to her except in the presence of company, at which times he was courteous and agreeable. It is also laid to his charge that he neglected the water system appurtenant to the home so that it became contaminated with dead squirrels and deceased cats, and the plaintiff was compelled to clean out the system; that he complained of the expense of a few dinner parties she gave; that, as she is informed and believes, he either cashed or changed a policy of insurance on his life of which she was the original beneficiary, so that it will be of no benefit to her; and that, although their son was born with a constitutional disease and was a constant care to the plaintiff, the defendant has never manifested any sympathy with her on account thereof. After a long recital of grievances by way of prologue, of which the foregoing is a condensed *résumé*, the complaint contains the following averments:

“That during the married life of plaintiff and defendant a young woman whose name the plaintiff does not care to allege, but will do so if the defendant insists that it shall be alleged, resided for a period of time with the plaintiff and defendant at their said home, and that during her residence with the plaintiff and defendant this said woman became pregnant, and the plaintiff, upon information and belief, alleges that defendant had illicit intercourse with said young woman, and that defendant is the

father of the child of said young woman. That upon one occasion plaintiff overheard a conversation between defendant and said young woman at which time said young woman accused defendant of being the father of her child, which accusation defendant did not deny, and defendant, plaintiff is informed and believes, has been providing said young woman with money, although she is of no relation to defendant.

"That, during the year 1914, the defendant was carrying on a correspondence with a young woman in California whose name the plaintiff does not care to allege, but will do so if the defendant desires that she shall allege the said name, which correspondence was not of a business character and which was of a flirtatious character, and plaintiff is informed and believes that defendant made repeated dates with said woman and met her clandestinely in California and wrote and received from her a number of letters of said character, all of which was without the knowledge or consent of plaintiff.

"That about 15 years ago this defendant was afflicted with a loathsome and incurable disease, to wit, syphilis, and at or about that time the defendant was ill for a great length of time with said disease which resulted in sores upon his body and was treated for this condition, and that at said time defendant knew that he was afflicted with syphilis and knew that for him to beget an offspring would result in said offspring being diseased and afflicted with said disease congenitally and be defective and a great care and burden to those who would have his care and charge. That nevertheless the defendant, without informing this plaintiff of his said condition or of the consequences that would flow therefrom, asserted his marital rights and begot a son, Raymond, who was born about 14 years ago. That said son was born congenitally afflicted with said disease of syphilis and has had ever since his birth, and now has, said syphilitic condition as a result of the previous condition of defendant above set forth. That during all of the times since said son was born he has been a constant

care and worry to the plaintiff due to said condition of said defendant. That during all of said time it has been possible, by proper treatment for said syphilitic condition, to have greatly lessened the suffering and diseased condition of said son, but that this plaintiff never knew what was the cause of said diseased condition of said son, and that defendant, although knowing at all times that said son was suffering from congenital syphilis caused by the condition of the defendant at the time of the conception of said son, concealed said fact from this plaintiff and failed and neglected to afford said son medical treatment which would have alleviated said condition, and that thereby the plaintiff has suffered great hardship in constant nursing and caring for said son and great grief and worry caused by his said diseased condition and his failure to improve in his health.

“That the realization of the condition of plaintiff’s said son is a constant cause of worry, suffering, and humiliation to the plaintiff, and the realization that the son of plaintiff and defendant is now afflicted with, and may be required to go through life afflicted with, said condition, is a constant cause of worry, suffering, and humiliation to the plaintiff, which is almost unbearable. That the defendant knew that he was afflicted with syphilis at the time when he had the same, and the failure of defendant to inform this plaintiff that the disease with which he was suffering, and for which he took treatment many months, was syphilis, and his failure to so inform the plaintiff of his said condition was cruel in the extreme, and ever since the plaintiff has learned of the said condition of the said defendant and has learned of the condition of their said son, caused as hereinbefore alleged by the said condition of the said defendant, the plaintiff has suffered beyond expression; and the said failure of the said defendant to so inform the plaintiff of his said condition and the condition of their said son is a continuing condition and act of cruelty, and ever since the plaintiff has learned the facts, as hereinbefore alleged, the plaintiff has loathed and despised the said defendant and ceased to cohabit with

him, and continued cohabitation with him is impossible."

The Bowers Investment Company was made defendant on the ground that the defendant husband had persuaded the plaintiff to join him in conveying all his real property to that concern, of the stock of which he was the sole owner. No land is described in any of the pleadings. No appearance was made for the investment company, and, in the view of the case taken here, it will not be necessary to make further mention of that defendant.

The cross-complaint of the defendant denounces as false all of the charges made against him by the complaint and counts on the filing of the latter pleading as an act of cruelty on the part of the plaintiff upon which he asks for a divorce. The reply challenged the averments of the answer. The Circuit Court heard the cause on the pleadings and testimony offered by the parties and rendered a decree denying relief to either of them and dismissing the suit. The plaintiff alone appealed.

AFFIRMED.

For appellant there was a brief with oral arguments by *Mr. Gus Newbury* and *Mr. Porter J. Neff*.

For respondents there was a brief over the names of *Mr. E. D. Briggs*, *Mr. William M. Briggs*, and *Mr. H. D. Norton*, with oral arguments by *Mr. E. D. Briggs* and *Mr. William M. Briggs*.

BURNETT, C. J.—1. The issues involved in this suit are almost exclusively those of fact. The testimony reported has been carefully perused and examined. A detailed analysis of it would not add anything to the sum of legal knowledge garnered in the official reports.

It is enough to say, on that subject, that the plaintiff has failed to make out her case by a preponderance of the evidence. Aside from the charge relating to the loathsome disease, the grievances enumerated in the complaint are in the main trivial and do not amount to personal indignities rendering life burdensome, within the meaning of the statute. Indeed, there is no direct proof that the occurrences such as neglect of the premises, failure to supply literature, complaint of the expense of dinner parties, and the like, impaired the plaintiff's health or threatened her with bodily harm. As said by Mr. Justice HASKELL in *Holyoke v. Holyoke*, 78 Me. 404 (6 Atl. 827):

"Divorce should not be a panacea for the infelicities of married life; if disappointment, suffering, and sorrow even be incident to that relation, they must be endured. The marriage yoke, by mutual forbearance, must be worn, even though it rides unevenly, and has become burdensome withal. Public policy requires that it should be so. Remove the allurements of divorce at pleasure, and husbands and wives will the more zealously strive to even the burdens and vexations of life, and soften by mutual accommodation so as to enjoy their marriage relation.

"Deplorable as it is, from the infirmities of human nature, cases occur where a willful disregard of marital duty, by act or word, either works, or threatens injury, so serious, that a continuance of cohabitation in marriage cannot be permitted with safety to the personal welfare and health of the injured party. Both a sound body and a sound mind are required to constitute health. Whatever treatment is proved in each particular case to seriously impair, or to seriously threaten to impair, either, is like a withering blast, and endangers 'life, limb, or health,' and constitutes the sixth cause for divorce in the act of 1883. Such is the weight of authority"—citing precedents.

2, 3. Annulment of the marriage relation is not to be granted under our statute for mere incompatibility of temper or uncongenial disposition. The conduct of the offending spouse must be such as to threaten personal or mental injury to the one complaining, rendering it unsafe for the latter if the marriage relation is continued, before a court is authorized to grant a divorce. Upon reading the record with care, there can be no reasonable ground for granting a divorce on the allegations outside of those relating to the malady mentioned in the complaint. The implied charges of adultery, based as they are on a statement of information and belief, are of doubtful efficacy as a matter of pleading; but evidence wholly fails to establish anything in support of such charges. An allegation of the kind must be supported by more than mere innuendo or suspicion. In order to grant relief upon such a charge, it must be proved as laid.

4. The contest was waged chiefly on the subject of the loathsome disease. The complaint does not charge that the defendant communicated it to the plaintiff, but rather that through the process of conception and gestation it was visited congenitally upon the son that was born to the parties. There is an irreconcilable conflict in the evidence. As usual, the experts do not agree in many respects. The plaintiff testifies to certain eruptions on the person of the defendant, which he absolutely denies. The testimony of the medical men seems to be without dispute that the sores she describes, if attributable to the disease in question, would leave scars; and all of the physicians who have examined the defendant declare there are no such marks on his person. Even the medical witnesses for the plaintiff locate the disease in the throat of defendant and denominate it "syphilitic sore throat." Other

physicians who treated the defendant at the time pronounced it diphtheria. All agree that the disease charged is acquired only by contact, that it starts at the point of contact, and that it may be acquired innocently through various media. This would seem to indicate that, even if the defendant had syphilis, he did not contract it adulterously. It would be disgusting to analyze the testimony in detail, as in an address to a jury on a question of fact, and hence the subject will not be pursued further.

The learned judge who heard the testimony had before him the principal witnesses in the case. His long experience as a jurist and his opportunity to observe the manner of witnesses while testifying are of great aid in arriving at the conclusions of fact which we deduce from a reading of the record, and we adopt his determination of the matter.

The decree is affirmed.

AFFIRMED.

McBRIDE, BEAN and HARRIS, JJ., concur.

Submitted on briefs at Pendleton May 3, affirmed June 15, rehearing granted July 27, argued on rehearing at Pendleton October 28, 1920, former opinion sustained January 18, 1921.

WINN v. TAYLOR.

(190 Pac. 342; 194 Pac. 857.)

Covenants—Lease—"Encumbrance."

1. An outstanding lease was an "encumbrance" within the meaning of the covenant of a warranty deed against encumbrances.

Covenants—Lease—Admitting Receipt of Rent—Burden of Proof—Deed.

2. In an action by grantee in a warranty deed, where defendant admitted the execution of the warranty deed and the receipt of

1. On unexpired lease as breach of covenant against encumbrances, see note in *Ann. Cas.* 1914D, 1176.

rental from a lessee for the ensuing year, it developed upon him to prove his right to retain such rent.

Appeal and Error—Assumption of Burden by Respondent—Harmless Error.

3. Where real question in dispute in action by grantee against grantor for breach of a covenant against encumbrances was whether defendant or plaintiff was entitled to rent which accrued after the execution of the warranty deed, defendant cannot complain that case was tried on the theory that plaintiff must show that his title was to relate back prior to the time lessee made a payment to defendant of rent for the ensuing year.

Covenants—Breach of Covenant—Encumbrances—Measure of Damages.

4. When the breach of a covenant against encumbrance in a warranty deed consists of the existence of an unexpired term or lease, the measure of damages, in the absence of any special circumstances, is the value of the use of the premises for the time during which the grantee has been deprived thereof.

Pleading—Complaint Sufficient to Sustain Judgment After Verdict.

5. A complaint which was not specific was broad enough after verdict to sustain a judgment, where the defendant met the issue and affirmatively pleaded his rights in the matter and admitted necessary facts.

Covenants—Interest Allowed Grantee—Action Collecting Rent.

6. Where grantor in warranty deed breached covenant against encumbrances, in that a lease existed, and collected the rental for the ensuing year, to which grantee was entitled, the grantee in an action to recover such rental was entitled to interest on the amount of the rent from the date of collection by the defendant, in view of Section 6028, L. O. L.

ON REHEARING.

Appeal and Error—Theory of Trial must be Adhered to.

7. The theory upon which the case was tried in the court below must be strictly adhered to on appeal.

Appeal and Error—Theory Determined from Entire Record and Brief.

8. The theory on which the case was tried below, which governs on appeal, must be determined from the entire record and the briefs of counsel, construing the pleadings on the theory most apparent, most clearly outlined by the facts stated, and according to their general scope and tenure.

Vendor and Purchaser—"Warranty Deed" Implies Usual Covenants of Warranty.

9. The term "warranty deed" in a contract of sale has a well-understood meaning as a deed containing the usual covenants generally inserted in a warranty deed, including the covenants that the land is free and clear from encumbrances.

Contracts—Variance Held Immaterial as not Misleading.

10. In applying the general rule that a plaintiff declaring on a written contract cannot recover on an oral contract or one partly oral, Section 97, Or. L., making variance immaterial unless it actually misled the adverse party to his prejudice must be considered, and a variance between allegation of a written contract and proof of one partly oral was not prejudicial where the other party alleged the oral agreement.

Pleading—Omission of Essential Allegation cannot be Aided by Verdict.

11. If the complaint is lacking in some material or essential allegation to establish a good cause of action, there can be no aid by verdict.

Pleading—Conclusions of Law cannot be Substituted for Statements of Fact.

12. Conclusions of law cannot be substituted for a statement of facts constituting the plaintiff's cause of action, but a statement of fact may be such that it cannot be made without including a conclusion.

Pleading—Defective Complaint Which Did not Omit Material Averment Held Cured by Verdict.

13. Where the complaint, after rejecting conclusions of law, did not omit any material allegation, its defects are cured by the verdict which established every reasonable inference that can be drawn therefrom.

Deeds—Contract Provisions as to Covenants Connected With Title or Possession Merged in Deed.

14. The deed given in execution of a contract for the sale of land and accepted as such governs the rights of the parties as to any inconsistent covenant connected with the title, possession, quantity or emblements of the land, though it does not supplant collateral and independent covenants.

Covenants—Breach by Existing Lease Gives Right of Action for Rental Value; "Rent."

15. Where the covenant against encumbrances was breached by an existing lease, the measure of the grantee's damages is the rental value of the land for the time possession is withheld from him, and he may recover the rent for such time collected by the vendor; "rent" being the compensation paid for the use of the demised premises which is treated as a profit arising out of lands and tenants corporeal.

Covenants—Grantor Covenants Against Known and Unknown Encumbrances.

16. The covenant against encumbrances in a warranty deed, protects the purchaser against existing encumbrances of which he has knowledge, as well as against those which are unknown to him.

Covenants—That Tenant Attorned After Expiration of Term for Which Vendor Collected Rent Does not Defeat Purchaser's Right to Rent.

17. Where the vendor collected a year's rent in advance shortly before conveying by warranty deed with covenant against encumbrance, the fact that at the expiration of the time for which rent was collected the tenant attorned to the purchaser does not defeat the purchaser's right to recover from the vendor the rental value prior to that time.

From Umatilla: FRED W. WILSON, Judge.

In Banc.

On April 21, 1914, the defendant was the owner of a 600-acre farm in Umatilla County, and executed a lease thereof to M. W. Hansell for a period of four and one-half years from that date to October 1, 1919, at a stipulated cash rental of \$5,100 for the first year, which also paid for the summer fallow and alfalfa then growing on the premises, and which was given in advance. The lease further provided for the payment of "the sum of \$6 per acre due and payable on October 1, 1914; and on all land cropped in the summer of 1914; and \$6 per acre due and payable on October 1, 1915, and each October 1st thereafter during the life of this lease on all the above-described premises." Pursuant to the terms of the lease Hansell at once took possession, ever since has been, and now is, holding the premises, and in all respects has complied with the terms and provisions of that agreement.

On August 21, 1917, the defendant executed to the plaintiff this writing:

"Received of Iley Winn ten thousand dollars, which I accept as earnest money on the purchase price of following described lands which I agree to deed to said Iley Winn on the further payment of forty thousand dollars on or before November first, nineteen hundred seventeen, and balance of fifty thousand four hundred forty dollars in cash or by note secured by first

mortgage on said lands, said note if given to draw 6½ per cent interest from November first payable annually and said note payable on or before ten years after date of same."

Then follows a description of the land, which is identical with that leased to Hansell except for the addition of a 40-acre tract of timber. The complaint alleges:

"That under said contract * * the defendant agreed to sell and the plaintiff agreed to purchase the above-described land, the defendant sold and assigned to the plaintiff all the defendant's rights, titles and interest in and to said described land, and that it was further made a part of the contract that the defendant should execute a warranty deed of conveyance to said property to the plaintiff as soon as was convenient, and the plaintiff should make the payments upon said premises agreed to between the plaintiff and defendant.

"That under the terms of agreement entered into between the plaintiff and defendant, wherein the plaintiff agreed to purchase said described land, the plaintiff was to be deemed the owner of said described land as of the date of the contract of purchase, which was August 21, 1917."

It is then averred that on October 17, 1917, the defendant made to the plaintiff a deed to the said lands, with the following covenants:

"Together with all and singular the tenements, hereditaments and appurtenances hereunto belonging or in anywise appertaining and also all his estate, right, title and interest in and to the same, including dower and claim of dower.

"To have and to hold the above described and granted premises unto the said Iley Winn, his heirs and assigns forever. And the said Moses Taylor, grantor above named, does covenant to and with the said Iley Winn, the above-named grantee, his heirs and assigns, that the above granted premises are free from all encumbrances, except the right of way of the

Oregon-Washington Railroad & Navigation Company through the lands described in said sections sixteen (16) and seventeen (17) and that he will, and his heirs, executors and administrators shall warrant and forever defend the above granted premises, and every part and parcel thereof, against the lawful claims and demands of all persons whomsoever, save and except as to encumbrance above mentioned."

Concurrent therewith and in accordance with the agreement of August 21, 1917, the plaintiff gave to the defendant a mortgage on the said lands in the sum of \$50,000 to secure a promissory note of the same date for that amount, payable on or before five years after date, with interest at the rate of 6½ per cent per annum.

The complaint says that under the terms of the lease Hansell paid the rental on October 1st of each and every year; that in the fall of 1917, on account of such rent, he paid the defendant the sum of \$3,522 without the consent or authority of the plaintiff; that according to the contract between them the plaintiff was entitled to that sum; that after its receipt he demanded payment of it from the defendant; and that the defendant has neglected and refused to pay the same or any part thereof to the plaintiff.

For a second cause of action the plaintiff claims \$52 on account of a pasture bill, and prays for judgment for \$3,522 with interest at 6 per cent per annum from October 2, 1917, and the further sum of \$52 and costs.

The answer admits the making of the lease to Hansell; that on August 21, 1917, the defendant agreed in writing to sell the real property to the plaintiff; that the latter then paid to the defendant "the sum of \$10,000 on the purchase price"; that he "agreed to deed said land to the said plaintiff on payment of the balance of the purchase price," and that the warranty

deed of October 17, 1917, was executed by the defendant. It is also admitted that "under the terms of the said lease the said M. W. Hansell paid lease money about the first day of October each year; that on or about the second day of October, 1917, the said M. W. Hansell paid as lease money the sum of \$3,522 dollars to the defendant"; and that the latter refuses to pay the same, or any part thereof, to the plaintiff.

As a further and separate answer the defendant alleges that at the time of making the written contract with the plaintiff, on August 21, 1917:

"It was specifically understood and agreed prior thereto and at said time and as a part of the same transaction, though not so stated in said writing, that the defendant would be entitled to collect the lease money coming due and payable on account of said real property from said M. W. Hansell on the first day of October, 1917, and he did collect it. Thereafter, on October 18, 1917, at the time when the plaintiff paid another portion of the purchase price and secured the payment of the balance of it, thereby completing the purchase of the said real property, defendant executed and delivered to the plaintiff a warranty deed to it; but before doing so it was expressly and specifically understood and agreed by and between plaintiff and defendant that the lease money which was due and payable on the said first day of October, 1917, should belong to the defendant."

Replying, the plaintiff made a general denial of all new matter in the further and separate answer.

At the trial ten of the jurors signed a verdict in favor of the plaintiff for the full amount of his claim, upon which judgment was entered against the defendant, and the latter appeals. He had filed a motion for judgment notwithstanding the verdict, on the ground that the complaint did not state facts sufficient to constitute a cause of action, and a motion for a new trial,

both of which were overruled. He makes twenty-two assignments of error, found upon the admission of verbal testimony, the instructions of the court and the overruling of his motions. **AFFIRMED.**

For appellant there was a brief submitted over the name of *Messrs. Peterson, Bishop & Clark*.

For respondent there was a brief prepared and submitted by *Mr. Homer I. Watts* and *Messrs. Raley, Raley & Steiwer*.

JOHNS, J.—It is admitted that on April 21, 1914, the defendant executed the lease to Hansell for a period of four and one-half years, for a stipulated yearly cash rental; that on August 21, 1917, for a consideration of \$10,000 the defendant contracted in writing to convey the lands to the plaintiff on or before November 1, 1917; that pursuant to such agreement, on October 17, 1917, he executed to the plaintiff his warranty deed, and that in consideration thereof the plaintiff gave him his note for \$50,000, dated August 21, 1917, and a mortgage on the conveyed realty to secure the payment thereof. Although the lease recited that the first year's rent was paid at the time of execution, there was no stipulation as to when rent for remaining years should be paid. But it is admitted that after the execution of the contract and prior to the giving of the deed Hansell paid the defendant rent in advance from October 1, 1917, to October 1, 1918.

There are no reservations or exceptions in the conveyance from the defendant to the plaintiff. The execution of the lease and the warranty deed and the payment of the rent in question are all set forth and alleged in the complaint; and in legal effect the plain-

tiff claims that he is entitled to the rent from October 1, 1917, to October 1, 1918, which Hansell paid in advance to the defendant.

It is admitted that at the time of executing the lease Hansell took possession of the premises; that he has held them ever since, and that his possession is lawful; and it inferentially appears that the lease was of record.

1. Although the contract between the plaintiff and the defendant does not specify the nature of the conveyance to be made by the defendant, yet, pursuant thereto the defendant executed a warranty deed, covenanting that the premises were "free from all encumbrances" except the railroad right of way, and that he would "warrant and forever defend the above-granted premises, and every part and parcel thereof, against the lawful claims and demands of all persons whomsoever, save and except as to encumbrance above mentioned," meaning the right of way. Concurrent with the execution of the deed the plaintiff became the owner of the lands in fee simple, and through its legal force and effect would be entitled to the use, possession and enjoyment thereof. But at that time the premises were subject to the Hansell lease and the defendant had collected rent in advance for the year beginning October 1, 1917. In *Fritz v. Pusey*, 31 Minn. 368 (18 N. W. 94), it is said:

"An 'encumbrance,' within the meaning of a covenant against encumbrances, includes any right or interest in the land which may subsist in third persons to the diminution of the value of the land, but consistent with the passing of the fee by the conveyance. * * Hence an outstanding lease is an encumbrance."

Crawford v. McDonald, 84 Ark. 415 (106 S. W. 206), holds that:

"The statutory covenant against encumbrances, implied by the use of the words 'grant, bargain and sell' in a deed, was broken at the time the deed was executed where the grantor had previously executed a written lease of the land which had not expired."

Brass v. Vandecar, 70 Neb. 35 (96 N. W. 1035), upholds the doctrine that:

"An unexpired term or lease, which prevents the grantee in the deed from recovering possession of the land described therein, is an encumbrance."

Defining "encumbrance," we find the following in 22 Cyc., page 73:

"It is an interest in or chargeable on land, which may subsist in, or in favor of, a third person consistently with a transfer of the fee, but diminishes the value of the estate to the occupant. It is an estate, interest or right in lands, diminishing their value to the general owner; a paramount right in or weight upon the land, which may lessen its value."

See, also, 2 Words & Phrases, Second Series, p. 1021, and authorities there cited. In *Friendly v. Ruff*, 61 Or. 42, 46 (120 Pac. 745, 746), this court, speaking through Mr. Justice BURNETT, said:

"An encumbrance, within the terms of such a covenant, includes any right to or interest in the land to the diminution of its value, but consistent with the passage of the fee by the conveyance. * * Within the rule thus laid down, any adverse right or privilege which would interfere with or curtail the full and exclusive enjoyment of the fee simple title by the grantee in the contract would justify the allegation of a breach of such a covenant."

We hold that the outstanding lease to Hansell was an encumbrance within the meaning of the covenants in the deed, for which an action would lie for breach.

2-5. As the defendant admitted the execution of the deed and the receipt of the rental, it devolved upon him

to prove his right to retain the sum in question. That matter was fairly submitted to the jury under instructions favorable to the defendant, and the jury found for the plaintiff. The latter assumed the burden of proof, and undertook to show that when the deed was executed on October 17, 1917, his title related to his contract of August 21, 1917, and that for such reason he was entitled to the rent which the defendant thereafter collected from Hansell. It will be noted that when the deed was executed, the plaintiff gave his note for \$50,000 to the defendant as of August 21, 1917, the date of the contract, and that it drew interest from that date. That was strong evidence tending to show that it was intended that the plaintiff's title should relate back, and that he should become the owner of the property as of August 21, 1917. Although the case was tried, and the jury was instructed, upon that theory, it was not prejudicial to the defendant, and was a matter about which he had no right to complain. The real question in dispute is whether the defendant or the plaintiff was entitled to the rent which accrued after the execution of the warranty deed. Although he was not bound by that rule, yet in his complaint the plaintiff adopted the amount of rental collected in advance by the defendant, as the measure of his recovery. Such a measure was sustained in *Fritz v. Pusey*, 31 Minn. 368 (18 N. W. 94), where it was held that:

“When the breach of either of the above covenants consists of the existence of an unexpired term or lease, the measure of damages, at least in the absence of any special circumstances, will be the value of the use of the premises for the time during which the grantee has been deprived of such use.”

The same rule is laid down in *Brass v. Vandecar*, 70 Neb. 35 (96 N. W. 1035). Although the complaint

might have been more specific, the defendant met the issue, and affirmatively pleaded that under an oral agreement with the plaintiff he had a legal right to the advance rental which he received, and according to the admitted facts that pleading is broad enough after verdict to sustain the judgment.

6. It is also contended that the plaintiff was not entitled to interest upon the amount of his claim prior to the rendition of judgment. The jury found substantially that the advance rental collected from Hansell by the defendant in October, 1917, belonged to the plaintiff. The action was commenced on October 1, 1918, about one year afterwards. Section 6028, L. O. L., provides:

“The rate of interest in this state shall be 6 per centum per annum * * on money received for the use of another and retained beyond a reasonable time without the owner’s consent, express or implied.”

There is no dispute concerning the amount of the rent involved or the time of collection. Under such a state of facts the plaintiff was entitled to interest.

The judgment is affirmed.

AFFIRMED.

Former opinion sustained January 18, 1921.

ON REHEARING.

(194 Pac. 857.)

The judgment in this case having been affirmed by an opinion of Mr. Justice JOHNS, *ante*, p. 556 (190 Pac. 342), we have again considered it on reargument.

Iley Winn, plaintiff and respondent, prosecuted an action at law against Moses Taylor, defendant and appellant, in the Circuit Court of the State of Oregon for Umatilla County. Winn sought to recover from

Taylor the sum of \$3,522, the value of the annual rental, which sum had been paid to Taylor by one M. W. Hansell, as lessee of certain farm lands owned by Taylor at the time of the execution of the deed and thereafter by him conveyed to Winn, as will hereafter more fully appear. On the twenty-first day of August, 1917, Taylor, for the consideration of \$10,000 paid to him as earnest-money by Iley Winn, executed a writing in which he agreed to "deed to Iley Winn certain lands therein described on the further payment of \$40,000 on or before November 1, 1917, and \$50,440 in cash or by note secured by first mortgage on said lands," and to "furnish an abstract of title showing all of said lands clear of encumbrance." On the seventeenth day of October thereafter, Taylor conveyed the said lands to Winn by warranty deed containing a covenant that the premises granted "are free from all encumbrances, except the right of way of the Oregon-Washington Railroad & Navigation Company. * * " The lands at that time were subject to the outstanding lease made by Taylor to Hansell, executed on the twenty-first day of April, 1914, covering the period of time from that date until the first day of October, 1919, and were at all times herein mentioned in the lawful possession of Hansell. While the terms of the lease are obscure, it has been continuously construed by the landlord and tenant as requiring the annual rental to be paid in advance on October 1st of each year, and it has been so paid. At the time of the execution and delivery of the deed conveying the premises to Winn, he knew that the lands were subject to the lease. Subsequent to the execution of the writing of August 21, 1917, and prior to the delivery of the deed, Taylor, on October 2d, collected the said sum of \$3,522, annual rent, in advance,

covering the term from October 1, 1917, to October 1, 1918. In the action at law between the parties each claimed to be entitled to said annual rent for the crop season of 1918, paid to Taylor as aforesaid.

Plaintiff, in effect pleaded, among other things, the defendant Taylor's ownership of certain lands; that the defendant executed a written lease to M. W. Hansell, whereby said lands were demised for a term of 5½ years from April 21, 1914, to October 1, 1919; the lessee's entry and continuous possession of said lands under the terms of said written instrument; that on August 2, 1917, plaintiff and defendant entered into a written contract, whereby plaintiff agreed to purchase, and defendant agreed to sell, said lands according to the terms therein expressed; that plaintiff paid defendant \$10,000 upon the contract of purchase; that it was further made a part of the contract that the defendant should execute a warranty deed of conveyance to said property to the plaintiff as soon as was convenient, and the plaintiff should make the remaining agreed payments; that under the terms of the agreement plaintiff was to be deemed owner of said lands from August 21, 1917; that the defendant did execute and deliver to plaintiff a warranty deed to said property (October 17, 1917); that the lessee paid defendant \$3,522 on October 2, 1917, as advance rent.

The defendant answered the complaint and admitted the execution of the writing bearing date August 21, 1917, whereby he agreed to sell to plaintiff the real property described in plaintiff's complaint, but alleged that—

“It was specifically understood and agreed prior thereto and at said time, and as a part of the same transaction, though not so stated in said writing, that the defendant would be entitled to collect the lease

money coming due and payable on account of said real property from said M. W. Hansell on the first day of October, 1917, and he did collect it."

He also alleged that—

"Thereafter, on the seventeenth day of October, when the plaintiff paid another portion of the purchase price and secured the balance of it, thereby completing the purchase of the said real property, defendant executed and delivered to the plaintiff a warranty deed to it; but, before doing so, it was expressly and specifically understood and agreed by and between plaintiff and defendant that the lease money which was due and payable on the first day of October, 1917, should belong to the defendant."

The defendant attached the writing made by him on August 21, 1917, and made the same a part of his answer.

From the answer, the evidence, and perhaps from the complaint itself, it appears that the writing mentioned in the complaint contained but a portion of the agreement.

The tenant Hansell, for the crop season of 1919, attorned to the plaintiff.

From a judgment of the court upon the verdict of the jury in favor of plaintiff in the sum of \$3,522, the defendant appeals to this court.

FORMER OPINION SUSTAINED ON REHEARING.

For the petition there was a brief over the name of *Messrs. Peterson, Bishop & Clark*, with oral arguments by *Mr. Peterson* and *Mr. Clark*.

For respondent there was a brief over the names of *Mr. Homer I. Watts* and *Messrs. Raley, Raley & Steiwer*, with oral arguments by *Mr. Raley* and *Mr. Steiwer*.

BROWN, J.—In counsels' brief in support of their petition for rehearing, it is asserted, in substance, that the court, at the former hearing, had ignored the theory upon which the case was tried in the lower court.

7, 8. It is well settled that the theory upon which the case was tried in the court below must be strictly adhered to on appeal: 2 R. C. L., p. 79, § 55. But how is the theory of a case ascertained? As taught in the same section of R. C. L.:

"In order to determine the theory of a case as presented to the trial court, the appellate court will look to the entire record and the briefs of counsel, and will construe the pleadings on the theory most apparent, most clearly outlined by the facts stated, and according to their general scope and tenor": *Knight & Jillson Co. v. Miller*, 172 Ind. 27 (87 N. E. 823, 18 Ann. Cas. 1146); *Oolitic Stone Co. v. Ridge* (1908), 169 Ind. 639 (83 N. E. 246); *Lake Erie etc. R. Co. v. McFall* (1905), 165 Ind. 574 (76 N. E. 400); *M. S. Huey Co. v. Johnston* (1905), 164 Ind. 489 (73 N. E. 996); *Seymour Water Co. v. City of Seymour* (1904), 163 Ind. 120 (70 N. E. 514).

9. Both the complaint and the answer allege the execution and the delivery to plaintiff by the defendant of a warranty deed conveying the lands described in the contract of August 21, 1917. The complaint shows that on October 17, 1917, the date of the execution and delivery of the warranty deed by Taylor to Winn, the lands thereby conveyed were encumbered by a lawful outstanding lease terminating October 1, 1919. The complaint further shows the amount of the damage, as measured by the rental value of the lands. The covenant of the deed warranting against encumbrances was broken at the instant it was made. The term "warranty deed" is well understood. As

stated in *Neff v. Rubin*, 161 Wis. 514 (154 N. W. 978):

"The term 'a warranty deed' in a contract for the sale and conveyance of land has in the law the clear and definite meaning that the vendor will convey the title to the premises by deed containing the usual covenants generally inserted in a warranty deed, which includes the covenant that the land is free and clear from encumbrances: 1 Warvelle, Vendors (2 ed.), §§ 418, 419. The court at an early day held that a contract to convey by 'a good and sufficient warranty deed' entitled the vendee to a warranty deed of the land 'free from all encumbrances': *Davidson v. Van Pelt*, 15 Wis. 341. Other cases to the same effect dealing with such contracts and the effects of covenants to convey by deed are: *Falkner v. Guild*, 10 Wis. 563; *Bateman v. Johnson*, 10 Wis. 1; *Davis v. Henderson*, 17 Wis. 105; *Curtis L. & L. Co. v. Interior L. Co.*, 137 Wis. 341, 347 (118 N. W. 853), and cases cited on p. 348; *Kramer v. Carter*, 136 Mass. 504."

10. The defendant attacks the complaint as pleading conclusions of law and as being insufficient and controlled by the instrument in writing executed on August 21, 1917, referred to in the complaint and made a part of the answer. It is a general rule of law that when a plaintiff declares on a written contract, he cannot be allowed to recover on proof of a verbal contract, or on one partly oral: 13 C. J. 753. But in making an application of this rule it should be remembered that Section 97, Or. L., provides that—

"No variance between the allegation in a pleading and the proof shall be deemed material, unless it have actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits."

The record shows that both the defendant and the plaintiff relied only partially upon the contract in writing, and as a part of the same transaction a parol

understanding was had in reference to the rent for the term from October 1, 1917, to October 1, 1918. The allegation of the complaint did not mislead the defendant. He made the writing a part of his answer and alleged a special contract in reference to the rent in defense to plaintiff's cause. It is said by an eminent law-writer that—

“The utmost liberality is shown by the courts in conforming the averments of the pleading to the case as proved, if the ends of justice will be subserved thereby”: Sec. 574, Pomeroy's Code Remedies (4 ed.).

Mr. Justice BEAN, in the case of *Wehrung v. Portland Country Club*, 61 Or. 48, 54 (120 Pac. 747, 749), said:

“It is within the discretion of the trial court to disregard a variance between an allegation and the proof, and nothing short of an abuse of such discretion can be assigned as error upon an appeal: *Brown v. Moore*, 3 Or. 435, 438. A variance between the allegation of a pleading and the proof is not material, unless the adverse party has been actually misled to his prejudice upon the merits; and the party claiming or alleging that he was so misled must prove to the satisfaction of the court in what respect he was misled: *Dodd v. Denny*, 6 Or. 156, 158; *Hill v. Mellon*, 3 Or. 542. In such case, in the absence of proof showing that the party has been so misled, it is the duty of the trial court to treat the alleged variance as immaterial: *Moore v. Frazer*, 15 Or. 635, 638 (16 Pac. 869). Where the party has not proved that he has been misled, the court may either direct the fact to be found according to the evidence, or may order an immediate amendment without costs: Section 98, L. O. L.; *Stokes v. Brown*, 20 Or. 530 (26 Pac. 561); *Denn v. Peters*, 36 Or. 486, 490 (59 Pac. 1109); *Creecy v. Joy*, 40 Or. 28, 31 (66 Pac. 295). In the case at bar, there is an absence of proof showing that the defendant, upon the trial of the cause, was misled

to its prejudice in making its defense. Therefore, on this appeal, there is nothing upon which to base a finding that the trial court abused its discretion in this regard."

To the same effect is *Nelson v. Dowgiallo*, 73 Or. 342 (143 Pac. 924, 1199).

11. The complaint in this case is not an example of perfect pleading, but is sufficient after a verdict. In holding this, we do not overlook the rule that, if the complaint is lacking in some material or essential allegation to establish a good cause, there can be no aider. As stated in *Nye v. Bill Nye Milling Co.*, 42 Or. 560, 561 (71 Pac. 1043, 1044):

"This principle has been so often announced by this court that further elaboration is unnecessary: *Weiner v. Lee Shing*, 12 Or. 276 (7 Pac. 111); *Booth v. Moody*, 30 Or. 222 (46 Pac. 884); *Foste v. Standard Ins. Co.*, 34 Or. 125 (54 Pac. 811); *Wright v. Ramp*, 41 Or. 285 (68 Pac. 731)."

12. Conclusions of law cannot be substituted for a statement of facts constituting the plaintiff's cause of action: *Nye v. Bill Nye Milling Co.*, 42 Or. 560 (71 Pac. 1043); *Chamberlain v. Townsend*, 72 Or. 207 (142 Pac. 782, 143 Pac. 924); *Hochfeld v. Portland*, 72 Or. 190, 194 (142 Pac. 824); *Greenberg v. German-American Ins. Co.*, 83 Or. 662, 665 (160 Pac. 536, 163 Pac. 820); *Hyde v. Kirkpatrick*, 78 Or. 466, 473 (153 Pac. 41, 488). But, as stated in *Oregon H. Builders v. Montgomery Inv. Co.*, 94 Or. 349, 356 (184 Pac. 487, 489):

"It is sometimes difficult to distinguish between conclusions of fact and conclusions of law, because it may be that a statement of fact cannot be made without including a conclusion, or it may be that a conclusion of law is such that, in the attending circumstances, it must be stated in the form of a statement of fact."

13. In the instant case, rejecting statements of mere conclusions of law, we believe that the complaint is not defective by reason of omitting some material allegation, and therefore, as written by Justice THAYER in *Weiner v. Lee Shing*, 12 Or. 276 (7 Pac. 111):

“The verdict * * establishes every reasonable inference that can be drawn therefrom.”

In the case at bar, the plaintiff was entitled to recover from the defendant, unless it was understood and agreed between the parties, as alleged by way of defense in the answer, that the defendant was to have the advance rent payable October 1, 1917, for the crop season for the year 1918. Testimony was adduced by the defendant upon this issue and it was submitted to the jury. The jury found against the defendant's contention. As the case stands, in the writing executed by Taylor on the twenty-first day of August, 1917, wherein he agreed to convey the said premises to Winn, no reservation was made of the rent. On the other hand, he promised in that writing to convey to Winn the said land by deed, and to furnish an abstract showing that the lands conveyed were free from all encumbrance. On October 17th following the execution of the writing, he made a deed to the lands conveyed, with the following covenants:

“And the said Moses Taylor, grantor above named, does covenant to and with the said Iley Winn, the above-named grantee, his heirs and assigns, that the above-granted premises are free from all encumbrances, except the right of way of the Oregon-Washington Railroad & Navigation Company through the lands described in said sections sixteen (16) and seventeen (17) and that he will, and his heirs, executors and administrators shall warrant and forever

defend the above granted premises, and every part and parcel thereof, against the lawful claims and demands of all persons whomsoever, save and except as to encumbrance above mentioned."

As part payment for the lands, Winn executed his promissory note and secured the same by a mortgage upon the lands, which note bore interest at the rate of 6½ per cent per annum upon the sum of \$50,000 from August 21, 1917, the date of the said writing.

14. Any inconsistencies between the terms of a contract of purchase of real estate and the terms of the deed are governed by the latter, into which the former are merged, and Winn's right to relief from the encumbrance depends upon the covenants for title which he received in his deed from Taylor: Rawle on Covenants for Title, § 320. To the same effect, see *Howes v. Barker*, 3 Johns. (N. Y.) 506 (3 Am. Dec. 526). In the case of *Houghtaling v. Lewis*, 10 Johns. (N. Y.) 297, it was held that—

"Articles of agreement for the conveyance of land are, in their nature, executory, and the acceptance of a deed, in pursuance thereof, is to be deemed, *prima facie*, an execution of the contract, and the agreement thereby becomes void, and of no further effect. Parties may, no doubt, enter into covenants collateral to the deed, or cases may be supposed when the deed would be deemed only a part execution of the contract, if the provisions in the two instruments clearly manifested such to have been the intention of the parties. But the *prima facie* presumption of law arising from the acceptance of a deed is that it is an execution of the whole contract; and the rights and remedies of the parties, in relation to such contract, are to be determined by such deed, and the original agreement becomes null and void."

The court cites *Howes v. Barker*, 3 Johns. (N. Y.) 506 (3 Am. Dec. 526), and observes that Chief Justice

KENT in that case said he could not surmount the impediment of the deed which the plaintiff had accepted from the defendant, and that he thought himself bound to look to that deed as the highest evidence of the agreement of the parties.

It is said in the case of *Bull v. Willard*, 9 Barb. (N. Y.) 641, that—

“Contracts for the sale of land are, in their nature, executory; and generally, the acceptance of a deed, in pursuance of a contract, is *prima facie* an execution thereof, and the rights and remedies of the parties are to be determined by the deed. * * ”

The court also holds that a covenant, in order to be deemed collateral and independent, so as not to be destroyed by the execution of the deed, must not look to, nor be connected with, the title, possession, quantity, or emblements of the land which is the subject of the contract. If it does so, the execution of the deed, in pursuance of the contract, will operate as an extinguishment of it.

In the case of *Shontz v. Brown*, 27 Pa. 123, 131, it is held:

“When a condition is performed it is thenceforth merged and gone. The presumption of law is that the acceptance of a deed in pursuance of articles is a satisfaction of all previous covenants, and where the conveyance contains none of the usual covenants the law supposes that the grantee agreed to take the title at his risk. * * The general rule is that a purchase is consummated by the conveyance; after which the parties have no recourse to each other except for imposition or fraud, or upon the covenants in the deed”: *Bailey v. Snyder*, 13 Serg. & R. 160; *Farmers' etc. Bank v. Galbraith*, 10 Barr. 490.

A well-known authority on real estate has written thus:

"When a deed is delivered and accepted as performance of a contract to convey, the contract is merged in the deed. Though the terms of the deed may vary from those contained in the contract, still the deed must be looked to alone to determine the rights of the parties. 'No rule of law is better settled than that where a deed has been executed and accepted as performance of an executory contract to convey real estate, the contract is *functus officio*, and the rights of the parties rest thereafter solely on the deed': 2 Devlin on Real Estate (3 ed.), § 850a, and authorities there cited.

In *Coleman v. Hart*, 25 Ind. 258, it is said that, "An oral agreement is merged in the covenants of a deed."

15. From the evidence and the pleadings, it would seem that the plaintiff had a right of action by reason of a breach of the covenant against encumbrances.

In the case of *Seitzinger v. Weaver*, 1 Rawle (Pa.), 377, it is said:

"Now, every burden on the estate, or clog on the title, such as a term for years, * * is an encumbrance. This special covenant of seisin is broken by the existence of an encumbrance created by the vendor, the instant it is sealed and delivered": Citing *Funk v. Voneida*, 11 Serg. & R. 109.

The Supreme Court of this state, speaking through Mr. Justice BURNETT, in *Friendly v. Ruff*, 61 Or. 42, 46 (120 Pac. 745, 746), thus defines the term "encumbrance":

"An encumbrance, within the terms of such a covenant, includes any right to or interest in the land to the diminution of its value, but consistent with the passage of the fee by the conveyance."

"'Encumbrance,' when used in reference to real estate, includes every right to, or interest in, the land granted, to the diminution of the value of the land,

but consistent with the passing of the fee by the owner thereof": Bouvier's Law Dictionary, and numerous authorities there cited.

This court has approved the following definition of the term "rent":

" 'Rent,' in the legal sense, is a compensation paid for the use of demised premises, and is treated as a profit arising out of lands and tenements corporeal": *Kaston v. Paxton*, 46 Or. 310 (80 Pac. 209, 114 Am. St. Rep. 871).

To the effect that the unexpired lease to Hansell constituted a breach of the covenant of the deed protecting Winn against encumbrances, see *Estep v. Bailey*, 94 Or. 59, 64 (185 Pac. 227). Also, see list of cases in note, *Musial v. Kudlik*, 87 Conn. 164 (87 Atl. 551, Ann. Cas. 1914D, 1176).

16. Defendant asserts that plaintiff had full knowledge of the outstanding lease and knew that defendant had collected the rent in advance, and that his action in accepting the warranty deed and paying the full purchase price for the land constituted a full settlement and satisfaction of any disputed claim he may have had for rent for the year from October 1, 1917, to October 1, 1918. This contention of defendant is erroneous. The rule of law, as stated by Justice BREWER, is that—

"The very purpose of the covenant is protection against defects; and to hold that one can be protected only against unknown defects would be to rob the covenant of more than one half its value, besides destroying the force of its language. If, from the force of the covenant, it is desired to eliminate known defects, or to limit the covenant in any way, it is easy to say so. General in its language it reaches to all defects within its terms, known or unknown": *Barlow v. Delaney* (C. C.), 40 Fed. 97.

Mr. Justice MOORE, in speaking for this court, in substance held that—

“The fact that an encumbrance not excepted from the operation of the covenant was known to the grantee is no defense to an action for breach of such covenant”: *Corbett v. Wrenn*, 25 Or. 305 (35 Pac. 658).

It is now held almost universally that when a grantor executes a warranty deed containing covenants, as in the case at bar, the covenantor covenants against known, as well as unknown, defects. This is so even though both parties may be in possession of all the facts: *Brown v. Taylor*, 115 Tenn. 1 (88 S. W. 933, 112 Am. St. Rep. 811, and note, 4 L. R. A. (N. S.) 309 and note); *Musial v. Kudlik*, 87 Conn. 164 (87 Atl. 551, Ann. Cas. 1914D, 1176, and note). In the case of *De Mars v. Koehler*, 62 N. J. Law, 203 (41 Atl. 720, 72 Am. St. Rep. 642), the court says that—

“Knowledge of the existence of an encumbrance not only did not destroy its inherent character as an encumbrance, but might, and often did, lead to the purchaser’s requiring the grantor to protect him by covenant.”

This reversed a former New Jersey case that had often been cited to the contrary.

17. In the case at bar, the general rule of law is that, in the absence of any special circumstance, the measure of recovery is the rental value of the land from October 1, 1917, to October 1, 1918, the period of time for which Taylor collected the rent: *Estep v. Bailey*, 94 Or. 59, 66 (185 Pac. 227). See, also, *Christie v. Ogle*, 33 Ill. 295; *Wragg v. Mead*, 120 Iowa, 319 (94 N. W. 856); *Brown v. Taylor*, 115 Tenn. 1 (88 S. W. 933, 4 L. R. A. (N. S.) 309); *Beutel v. American Mach. Co.*, 144 Ky. 57 (137 S. W. 799, 35 L. R. A. (N. S.) 779, and note). The fact that

Hansell attorned to the plaintiff for the rent of the premises for the crop season of 1919 does not affect in the least, or satisfy, the encumbrance that existed upon the place for the crop season of 1918: *Musial v. Kudlik*, 87 Conn. 164 (87 Atl. 551, Ann. Cas. 1914D, 1176).

"Damages under a covenant against encumbrances in a warranty deed are a just compensation for the injury actually suffered": 7 R. C. L. 1180, § 103; *Funk v. Voneida*, 11 Serg. & R. (Pa.) 109 (14 Am. Dec. 617).

The actual injury was the rent for the crop season of 1918.

When an encumbrance cannot be removed, as in the present case, where the tenant Hansell held possession under a valid lease, the plaintiff may be "allowed the annual value, or interest on the purchase money, during the length of time his enjoyment is suspended, or what would be a fair rent for the land": 2 Devlin on Real Estate (3 ed.), § 920.

FORMER OPINION SUSTAINED ON REHEARING.

Argued September 28, affirmed October 12, 1920, rehearing denied January 18, 1921.

RASOR v. WEST COAST DEVELOPMENT CO.

(192 Pac. 631.)

Appeal and Error—General Demurrer Could not Reach Defect of Parties not Affecting Cause as a Whole.

1. In an action by creditors against a portion of stockholders of insolvent corporation, where there was nothing in the pleadings to show that suit was instituted to wind up affairs of corporation, or that it was necessary to ascertain the whole amount of indebtedness, the creditors, or subscribers, who were liable for unpaid stock, suit being brought solely "to obtain the payment of the plaintiffs' judgment, and it does not appear by the bill or otherwise that there are any other creditors who wish to be made parties," the defendants cannot, on appeal, urge by reason of such defect of parties that

their general demurrer of no cause of action should have been sustained.

Corporations—Evidence Held to Show Stock to be Unpaid for.

2. In an action against stockholders of an insolvent corporation, evidence *held* to show that the sole consideration for the stock held by the defendants was their goodwill and influence in promoting a railroad to be built by the corporation.

Corporations—Goodwill and Influence in Promoting Construction of Railroad not Valid Consideration for Stock.

3. The mere use of goodwill and influence in promoting the construction of a railroad was neither a valid nor a valuable consideration for corporate stock, as far as liability of stockholders to creditors was concerned.

Corporations—One not Actually Receiving Stock Held Equitable Owner and Liable to Creditors.

4. One, who was president and director of a corporation, voted for and appointed a committee of appraisers of options and contracts, and voted for the adoption of its report, and agreed that the person obtaining the contracts and options was to receive certain stock therefor, which was to be apportioned among the officers, including the president, the stock being issued to the person furnishing the options and contracts pursuant to such agreement, was in equity and good conscience the owner and holder of the stock which he was to receive, even though he did not actually receive it, and he was liable to creditors as a subscriber for stock, on the corporation becoming insolvent.

Corporations—Creditors had Right to Assume That Capital Stock was of Par Value.

5. In the absence of knowledge of the actual facts or conditions under which stockholders of a corporation acquired their stock, creditors had the right to assume that the corporation was organized according to ordinary business practices, and that its capital stock was of par value, and was paid for on that basis.

Interest—Judgment Bears Same Interest as Written Contract on Which Founded.

6. A judgment against a corporation, founded upon a written contract providing for the payment of money with interest at 8 per cent, should bear interest at the same rate.

From Coos: JOHN S. COKE, Judge.

Department 2.

The plaintiffs are engineers with principal office in Los Angeles, California. The West Coast Development Company is an Oregon corporation, with principal office and place of business at Bandon, in Coos

County. It has a capital stock of \$100,000, divided into 1,000 shares of the par value of \$100 each. The remaining defendants are residents of that county. It is alleged that the defendant Carter was the owner of 51 shares of stock in the defendant corporation; that Murphey owned 50 shares, Dyer 50 shares, Stephen Gallier 51 shares, E. M. Gallier 51 shares, and R. H. Rosa 52 shares; that the stock owned and held by each of them was issued as fully paid, but that in truth and in fact no part of it was ever paid for; that after the corporation was organized it became indebted to the plaintiffs; and that it wholly failed to pay its obligation or any part thereof.

It is alleged, and admitted by the defendants, that an action was brought against the corporation for the amount due; that on April 23, 1915, judgment was rendered against the defendant company for \$4,829.22, with \$16.20 costs, bearing interest at 8 per cent per annum; that no appeal was ever taken therefrom; that no part of it has ever been paid by the defendants; and that the corporation is insolvent. The defendants claim, however, that the judgment is void and without consideration.

The plaintiffs say that they notified each of the stockholders to pay the judgment and make good the amount of the difference between the par value of the stock owned by each of them, and the amount actually paid for it. The prayer is for a decree determining the amount remaining due to the corporation from the defendant stockholders on the shares owned by each of them; that it be deemed an asset of the corporation for the benefit of the plaintiffs, to be applied in satisfaction of their claim; and that the plaintiffs have a several judgment against each of the defendants for the amount found to be due

on the stock held by them individually, "to such an extent as may be necessary for the full and complete satisfaction of plaintiffs' claim against the defendant corporation."

The corporation made default. The remaining defendants demurred generally to the complaint, on the ground that it did not state facts sufficient to constitute a cause of suit against either of them. This objection was overruled, and they then filed a joint answer, admitting the allegations concerning the number of shares of stock subscribed and the par value thereof, but denying that "750 shares were issued, or any number in excess of 743."

As a further and separate answer the defendant Stephen Gallier alleges that he subscribed for one share of stock only, for which he paid in full; that he never agreed in writing or otherwise to pay more than the \$100, and that he does not owe the corporation anything. He avers that any stock held by him over and above the single share for which he subscribed was transferred to him by one J. W. Roberts, the previous holder thereof; that any of such stock issued to Roberts was fully paid; and that the transfer from Roberts was for no consideration "other than as hereinafter alleged." Like defenses are pleaded by each of the other defendants. It is further alleged that the West Coast Development Company was organized by C. W. Lake and J. W. Roberts for the purpose of dealing in real estate along the route of a proposed railroad to be promoted by them, of which the business was to be separate and distinct from that of the defendant corporation; that through their efforts the defendants were induced to subscribe for one or two shares of stock for the purpose of completing the organiza-

tion of the defendant company; that at the time of its organization Roberts subscribed for 500 shares of its stock of the par value of \$50,000, and that in consideration therefor he transferred to the defendant corporation a large number of contracts, several hundred acres of tide-land adjoining the town of Bandon, and options, which the corporation deemed to be worth the full amount of his subscription.

It is averred that the proposed railroad was "furthered and promoted by said Gallier brothers, Rosa, Dyer, Carter, Murphey, and other Bandon residents, including the said Lake and Roberts"; that to insure the success of the railroad whereby the defendant corporation was expected to profit, "the said Lake and Roberts from time to time for moneys paid and advanced by different persons, issued and transferred from the 500 block of stock held by Roberts, bonuses, gifts, and inducements which were understood by all parties at the time as being fully paid stock"; and that it was never contemplated that any of the defendants owed anything or should pay any additional sum for the stock which they received from Roberts. As the defendants allege, "none of said assignees of said stock so transferred from Roberts owe anything to the corporation therefor." It is further stated that "the subscription, collection, and disbursement of such sum [paid in by the defendants] was to a small extent induced by the issuing of the collateral, bonus, and representations made by the West Coast Development Company and its several agents and sponsors," and that the defendant corporation issued all stock long before the plaintiffs became its creditors. It is claimed that the defendant corporation had no power to promote a railroad; that the indebtedness due the plaintiffs

was for a survey; that their employment was *ultra vires*; and that the judgment is null and void.

The plaintiffs replied, denying all of the material allegations of the answers. A trial resulted in a decree in their favor against each of the defendants Stephen and E. M. Gallier, Carter, Murphey, and Rosa for \$1,055 and against Dyer for \$1,012.74, with costs. All of these defendants appeal.

AFFIRMED.

For appellants there was a brief over the names of *Mr. L. A. Liljeqvist* and *Mr. C. R. Wade*, with an oral argument by *Mr. Liljeqvist*.

For respondents there was a brief and an oral argument by *Mr. J. T. Brand*.

JOHNS, J.—1. This suit was brought, and the decree was rendered for the sole use and benefit of the plaintiffs. It appears from the evidence that it is against a portion only of the stockholders of the corporation. The sole ground of demurrer is “that the complaint does not state facts sufficient to constitute a cause of suit.” There was no plea in abatement and the fact that there were other stockholders was not called to the attention of the court by any pleading, motion, or affidavit. By reason of the fact that the suit was brought for the benefit of the plaintiffs only, and that there are other stockholders, the defendants for the first time in this court contend that the general demurrer should have been sustained. Some authorities from other jurisdictions are cited, which apparently support their contention. In *Brundage v. Monumental Gold & Silver Min. Co.*, 12 Or. 322 (7 Pac. 314), this court held:

"In a suit by a creditor to enforce the individual liability of a stockholder for a debt of the corporation, it is not necessary that all the creditors of the corporation be joined, nor that all the stockholders be made defendants.

"In such a suit, if a defendant stockholder desires other stockholders to be made parties, he must bring them in at his own expense by an answer or other proper proceeding.

"When the object of the suit is to wind up the affairs of an insolvent corporation, and it becomes necessary to ascertain the whole amount of the indebtedness, and to whom due, and who are liable to contribute upon unpaid stock subscriptions, such suit should be in the name and for the benefit of all the creditors, and against all the stockholders found within the jurisdiction."

In the instant case there is nothing in the pleadings tending to show that the suit was instituted to settle or wind up the affairs of an insolvent corporation, or that it is necessary to ascertain the whole amount of indebtedness, the creditors, or subscribers who are liable for unpaid stock. The suit was brought solely "to obtain the payment of the plaintiffs' judgment, and it does not appear by the bill or otherwise that there are any other creditors who wish to be made parties." Upon such a record the defendants have no right at this time to complain of a defect of parties on either side.

At the organization of the defendant corporation, Roberts formally subscribed for 500 shares of its capital stock, Rosa for two shares, Stephen Gallier one, E. M. Gallier one, Jamieson two and Dyer two, making a total of 508 shares then subscribed. It appears that the eight shares last enumerated were fully paid up. The defendants admit that a total of 743 shares of stock was issued. The remaining 235

shares were issued from time to time after the company was organized. In legal effect, the defendants contend that the Roberts stock and the other 235 shares were fully paid up.

The record shows that on February 28, 1912, at a meeting of the board of directors, at which were present the defendants Dyer, Stephen Gallier and E. M. Gallier, the following motion was unanimously adopted:

"That three members of the corporation in good standing be appointed as appraisers for the purpose of determining the value of all services rendered in procuring options, bonds, rights of way, selling stock, legal services, secretary's compensation, and each and all things pertaining to the general promotion organization and complete organization of this corporation; and that said committee after appraising same be required to report thereon at the earliest convenient date."

Stephen Gallier, E. M. Gallier, and C. W. Lake were appointed as the committee. On March 1, 1912, another meeting of the board was held, at which all of the directors were present, and the following proceedings were had:

"Minutes of the previous meeting were read and approved. The report of the appraising committee was read, and upon motion by Stephen Gallier, seconded by E. M. Gallier, the report was unanimously accepted upon being put to an aye and nay vote. Moved by E. M. Gallier and seconded by Elbert Dyer, that the company issue to J. W. Roberts or his order, stock of the West Coast Dev. Co. to the amount of \$50,000, in liquidation of the report as submitted, stock to be issued fully paid."

If any written report of the committee was ever made, it is missing and cannot be found.

At or about the time of the organization, Roberts had obtained certain options for rights of way for a proposed railroad to be constructed from Bandon to Medford, and they were taken in the name of the defendant corporation or for its use and benefit. No titles were acquired, and no consideration was paid for such options. They were merely the result of the personal services of Roberts for two or three months, assisted by the individual defendants and other citizens of Bandon who were interested in the construction of the proposed railroad. That was the sole consideration which the corporation received for the Roberts block of 500 shares of stock, and was to be deemed a payment in full for the same.

The defendant Stephen Gallier testified thus:

"Q. Would you estimate his [Roberts'] services in obtaining these options and contracts, if any, were worth \$50,000 at that time,—is that correct?

"A. It must have been. * *

"Q. Mr. Roberts secured the options, but the options ran to the West Coast Development Company?

"A. Yes, sir. * *

"Q. But you felt in view of the work that your brother and the others performed, that it would be fair to give yourselves twenty-five shares apiece at that time?

"A. Probably so. * *

"Q. Was it in consideration of the time you put in that they issued the twenty-five shares which are shown in certificate 8, issued on that date?

"A. It must have been.

"Q. What else could it have been done for, except for services?

"A. That is all. * *

"Q. On this issue of twenty-five shares to E. M. Gallier, shown in stub of certificate 9, as being issued on March 2, 1912, to E. M. Gallier, that represents compensation for the services he rendered?

"A. It would apply to my case exactly, as near as I can remember. * *

"Q. How do you explain the issuance of twenty-five shares, of par value of twenty-five hundred dollars, to E. M. Gallier, after the corporation had been organized only a month, or month and a half, as compensation for his services for part time work?

"A. The only way I can explain that would be the influence he may have, or something.

"Q. The influence he might have?

"A. That is the only way I could figure that out.

"Q. These stock payments given you and him were in the nature of bonuses to see to it that your influence was right on the development project?

"A. Yes, sir.

"Q. That is the real truth of it?

"A. I don't know but what it is.

"Q. There is no doubt about it.

"A. I guess not.

"Q. The same thing was true with reference to the stock that was given to the other defendants?

"A. It might have been. * *

"Q. What would you say was the reasonable value of E. M. Gallier's time per month, you are better fit to know than anyone else?

"A. Probably one hundred dollars per month.

"Q. This second block of twenty-five shares was also issued by the corporation in the way of a bonus to procure your influence for the company?

"A. I presume it was. * *

"Q. But the stock-book shows that the shares were issued directly from the company to Mr. Carter?

"A. Yes, sir.

"Q. That is a true transaction?

"A. That is a true transaction.

"Q. And the same would be true with reference to the stock issued to your brother E. M. Gallier?

"A. Yes, and W. P. Murphey.

"Q. And E. Dyer?

"A. Yes, sir.

"Q. As far as you know there was no understanding that Roberts was to divvy up with these others?

"A. I don't remember that he was to divvy up his stock.

"Q. You were a member of the committee that made that appraisal, and also a director at that time?

"A. Yes. * *

"Q. It was a bonus given to you for helping things along?

"A. For promoting the railroad. * *

"Q. Do you not know that it was the plan of Mr. Roberts to divide up the issue of this stock with you, and Dyer, and others of his associates as a compensation for this right of way and preliminary survey, and options taken by them at both Bandon and Port Orford?

"A. That is the way I understood it at the time. * *

"Q. Is there a shred of record of any kind in the West Coast Development Company to indicate that a single property right actually owned by Roberts was sold by him to the West Coast Development Company, and in that question I am not referring to options which he procured, but I refer to property rights which he owned and sold?

"A. Not to my memory.

"Q. When the stock was issued to him there was no new property turned over to the corporation to the value of a dollar, was there?

"A. No, I don't know as there was. * *

"Q. I understood you to say that Roberts planned to divide the stock among the rest of you, and that you knew that at the time. That is true, is it?

"A. That is as near as I remember; he would pay us fellows in stock.

"Q. That was sort of a gentlemen's understanding?

"A. Yes, sir.

"Q. And that was at the time this appraisement committee met?

"A. I think it was; I would not be positive; when we went into this proposition.

"Q. When the appraisement committee met and voted him five hundred shares, it was with a gentlemen's agreement between the committee and Mr.

Roberts that a portion of those shares were to be transferred back to the members of the committee, and to the other directors and organizers of the company?

"A. The company in general, I think so.

"Q. The amount of stock which was voted to Roberts was not determined merely by the value of his services of any kind, but you determined that amount, and then added another amount, which was estimated, and which should be divided among others who had worked, is that true?

"A. Yes, I think that was true. * *

"Q. (By the Court.) Was the stock that was issued to the defendants in this action, Stephen Gallier, Ed. Gallier, C. C. Carter, W. P. Murphey, R. H. Rosa, and E. E. Dyer, issued to them out of the five hundred shares that had been subscribed by Roberts? Was that the understanding at the time that was issued?

"A. It was out of the five hundred shares; yes, I think it was. As I understood Mr. Roberts the stock that he issued to us would be for our services.

"Q. Instead of having the five hundred shares issued to him, he would have the five hundred shares, less the shares issued to you and these other defendants?

"A. I think it was."

The defendant Dyer gave the following testimony:

"A. We then organized two companies; one as a holding company and the other as a railroad company. The holding company turned out to be the West Coast Development Company, and the West Coast Development Company was to handle the finances to promote the railroad, to secure the rights of way, and for compensation for securing the rights of way they were to receive a certain amount of stock in the railroad company after it was financed. * * The fifty thousand dollars was voted practically as a bonus to take care of the right of way and the options, and we were all to share in that fifty thousand dollars that Roberts was supposed to get. * *

"Q. Do you know whether Roberts remained through the entire period or not?

"A. Roberts went away about the time that the corporation was organized. * *

"Q. You were present at the time this fifty thousand dollars' worth of stock was voted?

"A. Yes, sir. * * Pursuant to an arrangement I just mentioned with Mr. Roberts in regard to the fifty thousand dollar stock bonus. Of course we were all to share in that, and the right of way was to be turned over to the railroad company to make the value; that was the idea.

"Q. This block was not issued to Roberts?

"A. No, it was issued to his order; the stock was voted to be issued to his order, and of course it was supposed to be divided among us promoters.

"Q. That is the stock which was originally voted was to be divided among the promoters?

"A. Yes, sir.

"Q. You stated in your direct examination—were you all to share in the five hundred shares?

"A. Yes, everyone that exerted his influence or spent his time was to have the benefit of that stock.

"Q. What arrangement was there as to the division?

"A. There was none—no definite arrangement as to the division.

"Q. It was agreed that Roberts and Lake might make the division?

"A. That was the understanding; Lake was the man that practically handled the matter.

"Q. He was selected by the directors to do that?

"A. Yes, sir.

"Q. You expected to profit by that along with the rest?

"A. Yes, sir.

"Q. That was the understanding between you?

"A. That was practically the understanding.

"Q. And he did issue to you fifty shares of stock as shown by the books?

"A. The books show that he did, but he never delivered it.

"Q. (By the Court.) So the stock that was actually issued to those defendants, that is, C. C. Carter,

Murphey, Gallier, Rosa and E. E. Dyer, was a part of these five hundred shares which were to be issued to Roberts?

"A. The bulk of it was. I think Murphey and Carter received twenty-five hundred dollars' worth each, or something like that, outside of the fifty thousand dollars' worth. * *

"A. It is stipulated that it is the position of the defendants that all the stock issued to the defendants on the second of March, 1912, was a part of the five hundred shares voted to be issued and delivered to J. W. Roberts, and that may be considered as evidence in this case. But the defendants do not claim the stock issued subsequently to some of the members was a part of these five hundred shares; but it is claimed that the shares subsequently voted to E. M. Gallier, C. C. Carter and Stephen Gallier were for other services and duly authorized at other times. * *

"A. In order to organize a corporation under the laws of this state you have to have half the stock subscribed; in order to get that subscription of course Mr. Roberts subscribed for the full half of it, with the understanding that it was to be later divided among the promoters according to what the bunch seemed to think they had earned. That is the way it was, and it was practically left up to Lake—he was the secretary of the company—to divide the stock as he saw fit. * *

"Q. The stock was in truth issued by the corporation and given—

"A. To the different individuals who performed the services. Mr. Roberts got his proportion as the records show.

"Q. The stock out of this block of five hundred shares was issued on March 2d, and was distributed exclusively among the bunch who promoted the corporation?

"A. Yes, sir. * *

"Q. And this act of the corporation in voting and issuing five hundred shares to Roberts was merely a device to make it appear that the laws of the State of Oregon had been complied with?

"A. That is all. * *

"A. Other than what stock was subscribed for, there was some seven or eight hundred dollars' worth of stock that was actually subscribed for, and the money was supposed to be paid in.

"Q. That is about all the money that was subscribed in money?

"A. That is all I think, seven or eight hundred dollars.

"Q. In the entire corporation?

"A. Yes, sir.

"Q. The fact is, this corporation was mostly on paper and in water?

"A. Of course it was a promotion scheme; that is all there was to it.

"Q. (By the Court.) You said the consideration for the issuance of the stock to the defendants was the services performed by them, and the influence exercised by them in behalf of this plan of promoting the building of a railroad, and for services thereafter to be performed. Did that apply to the defendants E. M. Gallier and Stephen Gallier, and, if so, how did it happen that additional stock was issued to them?

"A. Additional stock was issued to them for services that they performed later on.

"Q. Were those services, or were they not, contemplated in this original agreement or understanding?

"A. No, they were not. At the division of this stock it was contemplated that each one at that time had done sufficient amount of work to be entitled to the amount of stock issued, and later on the two Galliers, and also Mr. Murphey and Mr. Carter, performed additional services, and they were voted more stock to compensate them for those services."

C. C. Carter gave the following testimony:

"Q. Do you know what you got stock from the West Coast Development Company for?

"A. There was no consideration in the letter when I got it, stating what purpose it was for.

"Q. Do you think it was in some way compensation for your services?

"A. I would think so.

"Q. As a bonus in this proposition?

"A. I would think so."

2, 3. The testimony is conclusive that all of the Roberts options were acquired for the use and benefit of the defendant corporation; that not a dollar was ever paid for, or any title acquired under any one of them; that they did not have any value; and that the only claim of Roberts against the corporation would be for personal services in procuring the options. The evidence also shows beyond contradiction that the resolution of the board which treated the Roberts stock as fully paid was adopted with the understanding and agreement that some of the defendants were to have portions of it for their goodwill and influence in obtaining options and promoting the construction of the proposed railroad, and that such portions of that stock were actually issued pursuant to the agreement, the next day after the resolution was adopted. Thereafter, following the same general plan, for a like consideration the remaining stock of the defendants was issued to and accepted by them. Exclusive of the eight shares originally subscribed and paid for by them, none of the defendants ever paid any money to the defendant corporation for any of the stock. As we construe the record, the defendants are respectively the owners and holders of the number of shares of stock in the defendant corporation alleged in the complaint, and the sole consideration therefor, exclusive of the eight shares, was their goodwill and influence in promoting the construction of the railroad from Bandon to Grants Pass or Medford. That is against public policy, as being neither a valid nor a valuable consideration.

4. It is contended that Dyer never received his stock. He was president and a director of the company, voted for and appointed the committee of appraisers, and voted for the adoption of its report. The testimony is conclusive that it was then agreed by the officers and directors that the Roberts stock was to be apportioned among them, and that the stock was issued pursuant to such agreement. In equity and good conscience, this would constitute Dyer the owner and holder of his stock, even though he did not actually receive it.

5. There is no allegation in the complaint of any specific act of fraud. The suit is founded upon the liability of stockholders for unpaid stock. But the proof is conclusive that legally a fraud was committed in the manner and method in which the stock was issued and the defendants became the owners and holders of their respective shares. It is contended, and the testimony indicates, that the defendants were acting in good faith, without any intent to defraud. But there is no allegation or proof that the plaintiffs had any knowledge of the actual facts or the conditions under which the defendants acquired their stock. In the absence of such information they would have a right to assume that the corporation was organized according to ordinary business practices, and that its capital stock was of par value. *McAllister v. American Hospital Assn.*, 62 Or. 530 (125 Pac. 286), is in point. It is there held:

“Only the legal holder of stock is liable for an unpaid portion of the subscription price, so that a person who took the equitable title of shares as indemnity for liability upon the corporation’s note to a bank did not thereby become liable on the stock either to the corporation or to its creditors as owner.

“Though persons securing shares of stock in a corporation at a price less than par expressly contract that their liability shall be limited to the price paid, and do not formally subscribe to the stock, a subscription is presumed from any agreement or act by which the stock is acquired from the corporation, and such persons are subscribers within Article XI, Section 3, of the Constitution, providing that stockholders of all corporations shall be liable for an indebtedness of said corporation to the amount of their stock subscribed and unpaid.”

The opinion by Mr. Chief Justice EAKIN reads as follows:

“Therefore, the holders of the stock issued as a bonus or gift to promoters, or otherwise disposed of by the corporation for less than par value, are liable accordingly for the par value of the stock to creditors who have acted upon the faith of the capital as represented by the stock.”

The court there quotes with approval the following excerpt from *Harrison v. Remington Paper Co.*, 140 Fed. 385 (72 C. C. A. 405, 5 Ann. Cas. 314, 3 L. R. A. (N. S.) 954):

“The Constitution, the statutes under which the corporation is organized, and the established rules of law in force when he becomes a stockholder, are read into and become a part of this contract. By his subscription for the stock, or by his receipt and acceptance of it, he solemnly agrees, in consideration of the benefits derived from its ownership, that he will faithfully perform the obligations and discharge the duties imposed upon a stockholder by the Constitution, the statutes, and the law.”

6. It is contended that the decree should not bear interest at the rate of 8 per cent per annum. The judgment against the defendant corporation was founded upon a written contract for the payment of money, which expressly provided for interest at that

rate, and the decree follows the contract. After a careful consideration of the numerous questions ably presented, the decree is affirmed.

AFFIRMED. REHEARING DENIED.

BENSON, BURNETT and BEAN, JJ., concur.

Argued October 7, reversed and dismissed November 23, 1920, rehearing denied January 18, 1921.

CRIM v. THOMPSON.

(193 Pac. 448.)

Quieting Title—"Cloud on Title" Defined.

1. A "cloud upon title" may be defined substantially as an estate in or encumbrance upon real property which is apparently valid but in fact without foundation.

Quieting Title—Valid Judgment and Sale Thereunder not a Cloud on Title.

2. Where defendant, who was acting as attorney for plaintiff in former litigation when a judgment was rendered against her, subsequently purchased land sold under execution issued on such judgment, such facts did not constitute a cloud on title in absence of any showing of invalidity in the judgment.

Judgment—Decree Awarding Defendant Attorney a Lien Held Inconsistent With Plaintiff's Allegations of Advances to Defendant.

3. Where a complaint alleged that defendant, while formerly acting as plaintiff's attorney and having in his possession money belonging to plaintiff applicable to the satisfaction of a judgment rendered against her, permitted the judgment to remain and caused or connived at issuance of execution thereon against her land which he purchased at the execution sale, a decree treating the sheriff's deed as a cloud on her title, but awarding the defendant a lien, was inconsistent with the averments of the complaint that defendant had possession of plaintiff's moneys sufficient and applicable to discharge of the judgment.

6. On right of attorney to purchase from adverse party subject matter of employment, see note in *Ann. Cas.* 1915C, 953.

On right of attorney of party to proceeding to purchase property at judicial sale, see note in *21 Ann. Cas.* 274.

On right of attorney to purchase subject matter of litigation or retainer from client and his duty in relation thereto, see notes in *23 L. R. A. (N. S.)* 679, and *28 L. R. A. (N. S.)* 723.

Evidence—Presumption That Clerk Issuing Execution Performed Duty Held not Overcome by Testimony.

4. The presumption that a clerk issuing an execution did so regularly at request of plaintiff, and not defendant's counsel, held not overcome by such clerk's testimony a few years afterwards that the best of her recollection was that she issued it at request of defendant's counsel.

Attorney and Client—Evidence Held not to Show Conversion of Client's Funds.

5. Evidence held insufficient to show that an attorney supplied with funds applicable to a judgment converted them to other uses.

Attorney and Client—Attorney may Purchase Land Sold Under Judgment Against His Client After Relation Terminated.

6. Where suit against client was brought in 1914 and judgment against her was enrolled the same year, the entry of which ended the relations between her and her counsel, he claiming compensation unpaid, a purchase by him under execution sale under such judgment in 1917 was not fraudulent.

From Clackamas: JAMES U. CAMPBELL, Judge.

Department 1.

The complaint charges that during the years 1912, 1913, and 1914 the plaintiff employed the defendant as a practicing attorney to attend to legal business for her and especially look after and protect her interests in her suit for divorce against her then husband, pending in Multnomah County, and for the ejectment of him from her real property in Clackamas County. This is admitted by the answer. The plaintiff further states, substantially, that afterwards the defendant frequently called upon the plaintiff to advance what he claimed to be necessary costs and expenses of said litigation, in pursuance of which she paid him, "besides other sums, the amounts of which are too numerous to mention and the items of which this plaintiff is unable now to determine with any degree of certainty or at all," designated amounts of money which she sets out in her complaint.

The answer admits the defendant received all of these amounts so stated, with the exception that on

February 24, 1913, the plaintiff paid the defendant \$11 only, instead of \$15, as charged in the complaint.

The plaintiff states that as a result of the Clackamas County ejectment case a judgment was rendered against her in this court for costs in the sum of \$57, and additional costs in the Circuit Court of \$13.50, totaling a judgment against her and in favor of her former husband in the sum of \$70.50. This is also admitted and established by the record. The following allegation then appears:

“That said defendant was furnished with ample and sufficient funds with which to pay all sums of costs, expenses and fees properly chargeable against this plaintiff, and this plaintiff was assured by defendant that he had fully paid all such costs, charges and fees so due and chargeable against this plaintiff.”

This quoted averment is denied by the answer. The complaint further charges that the defendant afterwards secretly and fraudulently induced the owner of the judgment against her to issue a pretended execution against the real property of the plaintiff, described in the complaint, and in July, 1916, caused the sheriff of Clackamas County to levy upon the premises, without any directions to that officer concerning plaintiff's personal property; on August 25, 1917, exposed the same for sale and bought in the property for fifty cents, and no more, in excess of the amount then due on the judgment, purchasing it in his own name; on September 18, 1917, secured from the court a pretended order confirming the sale, and afterwards clandestinely and without the knowledge of or notice to the plaintiff obtained from the sheriff a deed to the property, which he filed and recorded, the property being of the

value of \$3,000. It is said that the plaintiff had no notice of the entry of the judgment for costs, of the fraud of defendant in not applying the funds advanced to him upon the costs of the litigation, or of any of the proceedings connected with the said sale, until shortly after the pretended deed was filed for record. She claims that the deed constitutes a cloud upon her title, and prays for an order annulling the same and for such other and further relief as may be agreeable to equity.

These allegations of the complaint are denied by the answer except as stated therein. As mentioned above, the defendant admits receiving the moneys noted in the complaint, except \$11 instead of \$15 in one payment, and says that those are all of the sums of money paid by the plaintiff to him during the whole litigation; that they were applied upon the expenses thereof, taxes on the land mentioned in the complaint, and attorney's fees, as requested by the plaintiff; and that he fully protected the plaintiff's interests in all of the litigation brought by him on her behalf, without being paid for the years of service rendered, except \$29.98, which he says was applied by him on attorney's fees, "to cover defendant's personal expenses in making numerous trips to Oregon City, two trips to Oregon Homes, two trips to Salem, Oregon, and other incidental expenses, all in connection with the plaintiff's said business." This, in turn, was denied by the reply.

Under these pleadings the Circuit Court arrived at the conclusion of law that the defendant should have purchased the property in the name of the plaintiff and should have procured the deed in her name, and, having failed to do so, a trust resulted in favor of the plaintiff against the defendant entitling the former to

a decree establishing the same and requiring a conveyance from the defendant to her; and that the defendant is entitled to an equitable lien on said described property for the amount of money paid by him to the sheriff at said sale, to wit, \$123. A decree was entered accordingly, together with costs in favor of the plaintiff. The defendant appeals.

REVERSED AND DISMISSED.

For appellant there was a brief with oral arguments by *Mr. T. A. Hayes* and *Mr. A. G. Thompson*.

For respondent there was a brief over the names of *Mr. C. D. Latourette*, *Mr. John Ditchburn*, *Mr. D. C. Latourette* and *Mr. Earl C. Latourette*, with oral arguments by *Mr. C. D. Latourette* and *Mr. Ditchburn*.

BURNETT, J.—1, 2. A “cloud upon title” may be defined substantially as an estate in or encumbrance upon real property which is apparently valid but in fact without foundation: 2 Words & Phrases, 1233. No attack is made upon the validity of the judgment upon which the execution was issued. It was a valid, substantial claim upon the realty of the plaintiff. The execution was fair upon its face, constituting authority to the sheriff to sell the land for want of personal property, as he certifies in his return. As the sale was confirmed without objection and it did not appear that when the cause came on for confirmation of sale there was or could have been an objection to the regularity of sale, the deed followed as a matter of course, and is not void. It rests upon a regular judgment, execution, and sale. It can be disturbed only as between the parties, and then only because of some trust relation existing at the time of

the sale or some fraud vitiating the transaction. Strictly speaking, the complaint does not state facts sufficient to constitute a cause of suit to remove a cloud, for it does not appear that the judgment, the foundation of the alleged cloud, was in any way invalid.

3. The most that can be derived from the complaint is, that it charges the defendant with having in his possession money belonging to the plaintiff applicable to the satisfaction of the judgment, and that, being so equipped with her funds, he embezzled the same, was recreant to his trust, and bought the land in his own name, when he should have satisfied the judgment without the necessity of a sale. Stripped of all technicalities about the relation of attorney and client, this is the charge, in effect, against the defendant. The Circuit Court seems to have placed its decision upon the relation of attorney and client which once existed between the parties to this suit. It is apparent that the trial judge gave no credence to the averment that the defendant had received other sums of money in addition to those specified in the complaint, for he allowed the defendant an equitable lien upon the premises for the amount which he paid at the sale. This is inconsistent with the averments of the complaint; for if, as that document states, the defendant was furnished with ample and sufficient funds to pay this judgment, and did not pay it, he was not entitled to any lien upon the premises for what he did pay. In equity, as well as at law, the object of pleading is to notify the defendant of the cause of suit the plaintiff has against him, so that he may be advised in time to prepare his defense; and the decree must substantially follow the pleading: *Coughanour v. Hutchinson*, 41 Or. 419 (69 Pac. 68);

Union Street Ry. Co. v. First Nat. Bank, 42 Or. 606 (72 Pac. 586, 73 Pac. 341).

It appears in evidence that the plaintiff here had commenced a divorce case in Multnomah County, which was finally decided in this court against her, July 29, 1913, and in which the defendant acted as her attorney. During the trial of that case it was elicited that the plaintiff and her husband had contracted to buy some land from one Smalley and to take title in the name of both husband and wife. Whether by the entirety, or as tenants in common, does not appear. On the trial of the Multnomah County divorce case the defendant there disclaimed any interest in the contract and stated in substance that he had abandoned it. After the decision of that case in her favor in the Circuit Court, the plaintiff here took up the matter through the defendant as her attorney, with Smalley, who agreed to give a joint deed, as the contract called for, to whoever paid him the money. The plaintiff here paid the balance due upon the contract and took the deed, as stated. At her request the defendant then instituted in Clackamas County, where the land is situated, an action in ejectment against Mr. Crim, to recover possession of the property. She succeeded in obtaining a judgment against him in the Circuit Court for that purpose. In pursuance of that judgment the defendant here caused an execution to be issued, placing her in possession, and by authority thereof she was actually installed upon the property. This ejectment case was tried in the Circuit Court March 5 and 6, 1913. It was reversed in the Supreme Court March 24, 1914, and a mandate was issued April 23, 1914, and filed in the Circuit Court of Clackamas County June 2d.

Afterwards, as it appears from the testimony, the plaintiff employed other counsel and began a second suit for divorce, in Clackamas County. She prevailed in the Circuit Court and the case was affirmed in this court. We thus have two divorce cases, that brought in Multnomah County, which the plaintiff lost on appeal in this court after having gained it in the Circuit Court. The third in point of time, of the three cases, was the divorce suit in Clackamas County, in which the plaintiff here was finally successful; and the second, being the ejectment case, resulted in a judgment against her, upon which the sale in question was founded.

The charge in respect to the execution is to the effect that the defendant, disregarding his duty to the plaintiff as her attorney, secretly and fraudulently induced the owner of the judgment in the ejectment case to issue execution. That document recited on its face that, after the rendition of the judgment in favor of Crim, he assigned it to his attorneys, Kimball and Ringo. Both of these gentlemen testify plainly and unequivocally that they issued the execution on their own account, without consulting the defendant. It seems that there were two executions issued upon this judgment, the first on July 27, 1916, which was returned July 18, 1917, unsatisfied for want of bidders at the sale. On this latter date the execution was issued upon which the sale took place. The defendant testifies that he made no requests of anyone for the execution and did not know that it had been issued until about five days before the sale. The only evidence to the contrary of this appears in the plaintiff's rebuttal coming from Miss Iva M. Harrington, who was county clerk of Clackamas

County at the time the last execution was issued. Called upon to testify about that, she said:

"The best my memory serves me, it was issued at the request of Mr. Thompson, asking me to make an exact copy of the other execution that was returned the same day. * *

"Q. What is it in particular that recalls this incident to your mind?

"A. I remember just where Mr. Thompson stood, and it was—what makes me remember it, how I happen to recall it, it seemed like a peculiar circumstance to me. I can't remember what I said to him at the time, but anyway I asked him some question, and the way he answered me made me remember what the circumstances were."

She does not recall what was done after she had finished writing out the execution on her typewriter. She does not remember whether she gave the writ to the attorney who asked for it, or took it to the sheriff's office. Nor does she recollect whether or not she issued another execution in the case besides the two mentioned. Quoting from her memory of the record, she says that it shows that the execution of July 27, 1916, was issued at the request of either Kimball or Ringo, but the record does not show that the last execution was issued at the request of Thompson. In answer to this rebuttal testimony, the defendant testified, denying flatly that he had anything to do with, or asked the county clerk to issue, the last execution in the case, upon which the sale was made. He says that the only execution he had anything to do with in the ejectment case was the one which he caused to be issued to put the plaintiff here in possession of the premises; and he says, in respect to that, that Miss Harrington was then a deputy in the county clerk's office, was the only one there with whom he was ac-

quainted, and that he talked to her about that execution. She does not deny that he talked to her about the possessory execution. Apropos of this phase of the testimony, we find in section 213, Or. L., that—

“The party in whose favor a judgment is given, which requires the payment of money, the delivery of real or personal property, or either of them, may at any time after the entry thereof have a writ of execution issued for its enforcement, as provided in this chapter.”

4. Under this statute the county clerk would not have authority to issue a writ of execution on the request of anyone but the party in whose favor the judgment is given, or probably his assignee. That officer would have no right to issue execution at the behest of any other party to the suit. We must presume that the officer did her duty regularly, which would be in contradiction of what she here says, to wit, that she issued the execution on the order of someone who had no authority for that purpose. We have, then, the testimony of both Kimball and Ringo, the attorneys for Crim and assignees of the judgment, together with that of the defendant himself, that the latter had nothing whatever to do with, or knowledge of the issuance of, the execution, which is enforced by the presumption that the clerk did her duty regularly and issued the execution at the request of Kimball or Ringo, who were attorneys for the prevailing party. Opposed to this is the testimony of Miss Harrington, who simply says that, “the best her memory serves her,” the defendant requested the issuance of the writ. Under these circumstances, the preponderance of the evidence is clearly against the allegations of the complaint to the effect that the defendant procured the execution to be issued. It is

far more likely that Miss Harrington has confused the last execution with the one issued for the possession of the property. It would be the natural course of events for the defendant, as attorney for Mrs. Crim, having gained the ejectment case in the Circuit Court, to cause the execution for the possession to be issued. We find, therefore, that the defendant did not cause the issuance of the execution now in question.

We come next to the heart of the charge, viz., that the defendant had money in his hands belonging to the plaintiff sufficient to pay the judgment. The testimony of the plaintiff is characterized by contradictions of her own statement and of the record of the proceedings in the cases mentioned, and by lapses of memory which discredit her as a witness. It appears in evidence that she had caused the arrest of her husband in Multnomah County for nonsupport of herself and their children. Being dissatisfied with the efforts of the district attorney to prosecute the case, she called the defendant into the case. After repeated arguments on demurrer the Circuit Court finally held that the complaint was bad and the case was dismissed. Both she and the defendant agree that all claims which he had against her for fees or costs in that matter were settled about the time she began her suit for divorce in Multnomah County. She says that Thompson brought the ejectment case for her and that she won it. She declares that she thought when she won the ejectment action she was divorced then, and that she does not think the ejectment case was appealed to the Supreme Court. She says: "I am not sure, because since I am sick I am not sure of anything."

We are informed by her testimony that she went to California in the spring of 1917, and that while there in August of that year she suffered a stroke of paralysis accompanied by a "loss of memory, loss of flesh, and everything." She says that she had not heard and did not know that she had a case in the Supreme Court. She declares that she paid Thompson something nearly every week, beginning in 1912 and ending in 1913. Asked to tell what the arrangement was, she answered:

"Well, I promised to pay him just as I could; just pay him along for the costs of everything.

"Q. The costs?

"A. Yes, sir; and I supposed he would get the fees from the other side when he wanted them. I guess that is what I want to say.

"Q. He said?

"A. No. That is what I say.

"Q. What was the agreement with him? What did he say about fees?

"A. Well, I think that is just about what he said.

"Q. Can you repeat substantially the arrangement you had with him?

"A. No, sir; but I can say I was to pay the costs of everything.

"Q. What do you mean, the costs?

"A. Well, what the cases would cost for briefs and things he had to have."

In respect to getting attorney's fees from her defendant husband, the defendant in this suit testified that, when the plaintiff consulted him about commencing the first divorce suit, he told her that, if she was successful in the suit, she perhaps would recover something from Crim to meet her attorney's fees. He said in his testimony that the decree of the Circuit Court allowed \$75 for that purpose, but as that decree was reversed nothing was collected on that

account. The ejectment action was not instituted until after the first divorce decree was entered in the Circuit Court and it is not likely that the defendant made any such statement with reference to the action.

Asked to tell when her payments to the defendant started and how long they continued, the plaintiff testified:

"Well, I could not say exactly. I know I went downtown every week—not every week, but I will say nearly. I went down nearly every week and paid him something. Sometimes he would give me a receipt, and sometimes he would not. * *

"Q. I will ask you first if you can approximate about the amount you paid during the year, or a little over a year, approximately how much you paid in an aggregate sum?

"A. Well, I don't hardly know. I think it amounted to about four hundred dollars.

"Q. You paid him in cash?

"A. Yes, sir; because I have receipts for part of it, and he did not give me receipts for all of it."

In passing, it may be remarked that during the trial of this case the defendant called for the receipts he had given her and they were not produced. She first declared that the way she got the real property was through the decision of the Supreme Court in the second divorce case, and immediately afterwards she answered that she got it by the ejectment action. She was asked whether that action was appealed, and answered: "No, sir; I don't remember it."

She admits getting a letter from Thompson dated March 26, 1915, which is in the record, and having a statement of her account since that date. The statement which she admits receiving is dated April 2, 1914, which was after the reversal of the ejectment case in this court. It is addressed to the plaintiff as

a statement of her account to that date. She is charged with attorney's fees in the Multnomah County case of \$75, and on appeal of that case to this court, \$150; attorney's fee in the ejectment case in the Circuit Court, \$75; in this court, \$250—totaling \$550. Then follows a statement of items paid out by the defendant in the two cases in the Circuit Court and in the Supreme Court, totaling \$112.65. The plaintiff is credited by the items of cash which she paid to the defendant as stated in the complaint, except the item of \$15, which the defendant claims was \$11. The total of her payments is \$160, from which, after deducting the \$112.65 of disbursements already mentioned, there remains a balance of \$47.35, which he deducts from the charges of attorney's fees in all of the litigation, leaving a balance of \$502.65 due him. The letter of March 26, 1915, written nearly a year after the date of the account, calls her attention to the statement which had been prepared sometime before at the plaintiff's request. The letter declares:

"You will see by the statement that I have given you credit for all sums paid by you to me, including all of the money that I expended on the four cases as necessary expense. The account shows that you paid me \$47.35 more than I expended and I have given you credit for this amount.

"I have charged conservative fees for the work done, but if you can pay me or secure me for the same, I am willing to discount the bill to considerable extent."

The plaintiff admits receiving this letter and the account. There is another copy of an account dated March 14, 1913, prior to the final disposition of any of the litigation, which the defendant testifies he delivered in person to the plaintiff. It contains a statement of their affairs up to that time and corresponds

pro tanto with the more extended statement of April 2, 1914. There is still a third paper of this kind introduced in evidence, which states the account as before, showing a balance of \$502.65 in favor of the defendant. This, he says, was a copy of the statement which he sent her with the letter of March 26, 1915. He declares that the plaintiff never made any objection whatever to any of the accounts. She does not deny his statement on that subject and does not intimate in any manner whatever that she made any objection, either to his charges or to the credits he had given her for money which she had paid to him.

5. In such cases as *Truman v. Owens*, 17 Or. 523 (21 Pac. 665), *Holmes v. Page*, 19 Or. 232 (23 Pac. 961), and *Fleischner v. Kubli*, 20 Or. 328 (25 Pac. 1086), it has been held by this court that where parties have had business dealings with each other, in which there are items of debit and credit, a statement of the same rendered by one to the other and received without objection by the latter urged within a reasonable time becomes a stated account binding upon the parties, unless for fraud, error, or mistake, which must be averred in the pleading of the party seeking to open the account. Because it is not essential here, we do not decide that the statements introduced in evidence amounted to accounts stated; but they are valuable in evidence as a statement made to the plaintiff and her conduct with reference thereto, with the deduction that the defendant's account of the affair is the more worthy of belief, especially where the burden of proof rests upon the plaintiff, who affirms in substance that the defendant had more money of hers than the \$160 with which he credits her, and which, barring the difference between \$15 and \$11 already mentioned, is all that she claims in her complaint that

she ever paid him. These statements were rendered to her, as the evidence shows, prior to the time that she suffered the stroke of paralysis. Presumably and apparently she was then amply capable of taking care of her own affairs, and if he credited her with only \$160 when in fact she had paid him about \$400, as she now thinks, it was her duty then to call his attention to the error. As a question of fact, we are impressed with the belief that the preponderance of the evidence shows that the defendant's statement of their monetary transactions is correct. Speaking in detail about her payments, he declares that some of them were applied directly by her on account of attorney's fees, which she does not dispute. Taken altogether, her statement is a vague, groping narration, proceeding from a defective memory, sometimes almost incoherent or at least contradictory. The cold record compels the conclusion that her statement, innocent though it may be, is not so credible as that of the defendant, who speaks circumstantially from the records of his office. The plain conclusion is that the defendant must be acquitted of what amounts to a charge of embezzlement.

6. The question then recurs, whether he was qualified to bid at the execution sale. We must bear in mind that the mandate in the ejectment case issued out of this court April 23, 1914, and was filed in the Circuit Court on June 2d of that year. The execution upon which the sale was made recites that the judgment of the Circuit Court on the mandate of this court was enrolled June 15, 1914. The sale occurred August 25, 1917, and was confirmed September 18, 1917, all more than three years after the entry of the final judgment marking the absolute determination of the litigation so far as the defendant was concerned.

The sheriff's deed bears date September 30, 1918. In *Newkirk v. Stevens*, 152 N. C. 498 (67 S. E. 1013), speaking to the point here in question, it is said:

"It must be true that the relation of attorney and client in a case like this one does not last forever. It ends at some time, and the time that the relation terminates in any particular case will depend upon the facts and circumstances and the nature of the employment or retainer. In the absence of special circumstances, 'the employment of an attorney continues as long as the suit or business upon which he is engaged is pending, and ordinarily comes to an end with the completion of the special task for which he was employed. At common law, the obtaining of a final judgment was such a termination of a suit as brought the relation to a close.'"

So, in *Knowlton v. Mackenzie*, 110 Cal. 183 (42 Pac. 580), the court said:

"For the purpose of prosecuting or defending an action the authority of an attorney ordinarily terminates with the entry of judgment: *Kellogg v. Gilbert*, 10 Johns. 220 (6 Am. Dec. 335); *Weeks*, Attys. at Law, § 239; except for the purpose of * * enforcing the judgment or seeking to have it set aside or reversed."

In *Harrison v. Murphey*, 39 Okl. 548 (135 Pac. 1137, 49 L. R. A. (N. S.) 1059), the defendant as attorney had once represented the plaintiff in various matters that had been closed up. He drew the mortgage for the plaintiff and, when it was foreclosed, bought the land from the purchaser at foreclosure sale. The court said:

"It is not shown that the defendant could have used, or needed to use, much less abuse, any information gained or position or situation attained through the relation of client and attorney, once existing. He had no duty to perform inconsistent with the purchase; there was no defect in his former work to be

assailed; no outstanding title was procured; no latent defect was availed of; when his relation terminated he left his clients possessing the fee. Had they met their obligations according to their tenor, there would have been no trouble. No trouble they now have is traceable to defendant. It cannot be the law that an attorney, in the absence of fraud or an abuse of confidence in some way, is forever debarred from acquiring property, honestly and in good faith, solely because it had formerly belonged to a person who at some time in the past had been his client."

In *Tobler v. Nevitt*, 45 Colo. 231 (100 Pac. 416, 132 Am. St. Rep. 142, 16 Ann. Cas. 925, note, 23 L. R. A. (N. S.) 702), it was said:

"At common law, the general rule is that the authority of an attorney to represent his client in an action ceases upon its final determination and the entry of judgment. Especially was this true as to the defendant's attorney—or, more accurately speaking, the attorney for the defeated party."

In *Smith v. Craft*, 58 S. W. 500 (22 Ky. Law Rep. 643), it is said:

"An attorney had a right to purchase claims against the firm, as in so doing he used no information obtained as counsel, nor took unfair advantage of the Welsh Coal Company, or its general creditors."

In *Elmore v. Johnson*, 143 Ill. 513 (32 N. E. 413, 36 Am. St. Rep. 401, 21 L. R. A. 366), the court lays down the rule that before the assumption of the relation of attorney and client, and after its expiration, the two deal at arm's-length, but not so while it is in existence.

In *Tancre v. Reynolds*, 35 Minn. 476 (29 N. W. 171), according to the syllabus, it is ruled that—

"An attorney who contracts with his client is subject to the *onus* of proving that, as respects the con-

tracts, no advantage was taken of the client's situation. But where a previously existing relation of attorney and client has come to an end, so that the parties are dealing, each for himself, at arm's-length, this strict rule does not apply; but to avoid the contract (otherwise unobjectionable), the client must show that it was procured by actual fraud."

The testimony shows that, after the judgment in ejectment had been finally entered against the plaintiff here, she employed other counsel to carry on her subsequent litigation resulting in a divorce from her husband. She herself says she never saw the defendant afterwards. The plain conclusion of fact, independent of the presumption of law, is that their relation of attorney and client ended with the rendition of the final judgment in the ejectment action. The defendant explains why he bid in the property. He says in substance that the plaintiff owed him the balance of the accounts as he had stated it to her, and that he bought the property to protect his interests, for, if she suffered it to go to sale to someone else, she could assign her equity of redemption to some stranger and the defendant would be cut off from any means of securing his claim.

We have, then, an execution, as we believe the fact to be, issued, not at the request or with the knowledge of the defendant, but by the owners of the judgment, and a sale regularly advertised, at which the defendant, like anyone else, had a right to bid. There is no law compelling him to bid more than will carry the sale. It appears in evidence that a former execution upon the same judgment had been issued and returned for want of bidders. The sale, for aught that appears, was made fairly and openly, and the defendant was entitled to what benefit accrued to him on account of the sale, so far as anything appears in this

case. The plaintiff had gone to California, and until the day of sale the defendant had been unable to locate her. The attorneys Kimball and Ringo had unsuccessfully endeavored to get her to pay the judgment. She averred she had no knowledge of any of the proceedings connected with the sale, until shortly after the sheriff's deed was filed for record. She herself testified that in the spring of 1918 she was informed by a real estate man that the property had been sold and next morning she went to see her present counsel to have the matter investigated. The real estate man to whom she referred testified that in March, 1918, he told her the defendant had title to the property through execution sale. Her right to redeem did not expire until September 18, 1918, or one year after confirmation. It is evident from her own statement that she knew of the sale in time to redeem her property, but preferred to base her attack upon the defendant on a charge amounting substantially to embezzlement. The preponderance of the evidence is strongly against that theory.

For the purposes of this decision it is not necessary to go into an analysis of the authorities on setting aside a sale for mere inadequacy of price. It is sufficient to say that in all of the cases cited by the plaintiff the element appears that previous to commencing the suit the moving party had tendered to the purchaser the amount of his bid and had shown circumstances of fraud and concealment on the part of the defendant, or conduct lulling the plaintiff into repose, when a duty rested upon the purchaser to notify the former client. Having shown that the relation of client and attorney once existing had come to an end, no duty was cast upon this defendant, so far as the present record shows, requiring him to pay

any attention whatever to the plaintiff. As she had engaged other counsel, he might on that fact consider that his employment had ceased, independent of the rule of law on that subject. Owing no duty to her, he committed no fraud in attending the sale and becoming the highest bidder for the property. It is contended that it is an element of fraud that no effort was made to satisfy the judgment out of the plaintiff's personal property. It is not alleged, nor does it appear in evidence, that she had any personal property. The officer certifies that the levy upon and sale of the real property happened for want of personal property. The cases involving that point, cited by the plaintiff, all show that there was personal property in abundance belonging to the plaintiff within the knowledge of the moving party in the writ. No such condition appears here.

It is not apparent that the defendant violated any confidence between himself and his former client. The cases cited on that feature by the plaintiff relate to incidents where a secret advantage was taken of the client, who reposed confidence in the attorney, on the question involved. Here the action was commenced at the instance of the plaintiff, and it was a matter of public record, open to the inspection of all men. There was no private confidence involved. The judgment was the result of her own action. Of course, if the defendant had in fact money of the plaintiff in his hands sufficient to cover the amount of his bid, a tender of that sum as a prerequisite for commencing the suit would not be necessary. But the great weight of the evidence shows that this was not the situation; so that, if the plaintiff would now be let in to redeem, she must in any event herself first do equity by tendering to the defendant the amount

of money which he expended for the property. The conclusion is that she is not entitled to relief in equity. The suit will be dismissed without prejudice to either party in equity or law, as they shall be advised to proceed.

REVERSED AND DISMISSED. REHEARING DENIED.

McBRIDE, C. J., and BENSON and HARRIS, JJ., concur.

Argued October 19, affirmed November 30, 1920, rehearing denied January 18, 1921.

SANDERS v. PORTLAND & O. C. RY. CO.

(193 Pac. 660.)

Eminent Domain—Where No Damages for Occupation Before Payment are Shown, Only Nominal Damages can be had.

1. In an action against a railroad company for ejectment and damages for taking possession of land after condemnation and before payment of damages assessed, where there was no evidence of damage by reason of defendant's occupation, even if wrongful, plaintiff could recover only nominal damages, and the fact that money for the condemned land was subsequently paid to mortgagee under court order is immaterial.

Eminent Domain—Judgment Fixing Price Does not Authorize Condemning Party to Take Possession Without Payment.

2. A judgment fixing the value of land does not authorize the party condemning to take possession without paying the ascertained value into court as required by law.

Eminent Domain—Owner's Appeal from Condemnation Judgment Does not Dispense With Necessity of Payment Before Taking Land.

3. The owner's prompt appeal from a preliminary judgment assessing damages did not dispense with the necessity of the condemning railway company's paying the damages assessed; for although Section 7104, Or. L., provides that such appeal shall not prevent the corporation from using the land, yet the compensation must be first assessed and tendered as required by Article I, Section 18, of the Constitution.

Eminent Domain—Whether Failure to Object to Condemning Corporation's Taking Land Without Paying Award Amounted to a License Held not Material Where no Damages Shown.

4. Whether owner's failure to object to condemning corporation's taking immediate possession of the land and constructing railroad

thereon amounted under the circumstances to a license was not material in an action by the owners where no damages were shown, particularly where owners received interest on the original assessment to which they were not morally and legally entitled, and the delay was caused partly by their groundless appeal.

Eminent Domain—Delay Held Insufficient to Show Abandonment of Proceedings.

5. Where a railroad company had land condemned, and the owner immediately appealed, and pending appeal the company constructed its railroad thereon, its delay in entering the mandate on appeal for a period of nine months and in payment of condemnation money held not to show abandonment by the company of proceedings in which the owner's appeal was groundless.

From Multnomah: WILLIAM N. GATENS, Judge.

Department 1.

The complaint in this case is predicated upon two separate causes of action. The first is in ejectment to secure possession of a tract of about three and one-half acres of land situated in Multnomah County, Oregon. The second cause of action alleges that about November 1, 1915, the defendant wrongfully and without right entered upon the said land and constructed a line of railway across the same, and is now operating the railway. General and special damages therefor are alleged to the extent of \$1,500. The facts were stipulated and the findings of the court substantially follow the stipulation. The conclusion of law is that the plaintiffs are not entitled to recover.

The circumstances leading up to the present litigation find their inception in *Portland & O. C. Ry. Co. v. Sanders*, 86 Or. 62 (167 Pac. 564). In that action the defendant here sought to condemn for railway purposes a strip of land 20 feet in width across the tract described in the complaint here. The plaintiffs in this action, defendants in the condemnation proceeding, admitted every allegation of the complaint except the damages, and upon the trial the damages were assessed at \$235. The state land board of Oregon, having a

mortgage upon said land, was made a party defendant, and in the judgment of condemnation it was ordered that the clerk should pay the damages awarded the then defendants Sanders to said land board. An appeal was taken to this court by the defendants Sanders, and the judgment of the Circuit Court was affirmed. The preliminary judgment of condemnation was entered in the Circuit Court in February, 1916, and pending the appeal therefrom by Sanders and his wife, the defendant in the present action in June, 1916, entered upon the lands and constructed its railway along the 20-foot strip in controversy in the condemnation action, and has ever since held the same and operated its railway over it. The defendant here did not pay to the clerk the award of damages made by the court before taking possession of the land, and the mandate in the condemnation case was never entered in the Circuit Court until June 7, 1918, one day after this action was begun, when the defendant here caused the same to be entered, paid to the clerk the \$235, with accrued interest, and obtained its final judgment condemning the land, and a further judgment against Sanders and his wife for \$124, being its costs on the appeal.

The amount paid by the defendant herein to the clerk on June 7, 1918, was paid by that officer to the state land board, to be applied on its mortgage. This application by the clerk of the proceeds of the judgment was protested by the plaintiffs here, but no remonstrance was made to this defendant, and it had no knowledge of such application. It appears that the plaintiffs have paid the taxes upon all the tract owned by them, including the strip occupied by the defendant railway, amounting in all to \$242, and that the defendant has paid no taxes on said strip, except that in 1917 and 1918 it paid taxes upon its entire trackage and

right of way upon a mileage basis. There was no evidence or indication as to the value of the land or the rental value of the portion occupied by the defendant railway, and defendant did not occupy or claim the right to use any other part of said strip. The court found for the defendant, and plaintiffs appeal.

AFFIRMED.

For appellants there was a brief over the names of *Mr. J. F. Shelton* and *Mr. G. E. Hamaker*, with an oral argument by *Mr. Shelton*.

For respondent there was a brief over the names of *Messrs. Hart & Hart*, with an oral argument by *Mr. J. N. Hart*.

McBRIDE, C. J.—1. We will consider the causes of action in inverse order to which they are presented. As there is no evidence of damage by reason of defendant's occupation of the land, even if such occupation was wrongful, plaintiffs could recover only nominal damages. In the absence of showing special or other damages, these nominal damages were amply compensated by the payment of interest on the amount of the award from the date thereof until June 7, 1918. The fact that the amount awarded plaintiffs was paid by the clerk to the state land board to be applied on the mortgage, instead of being paid to plaintiffs, can have no bearing here. Such payment was strictly in accord with the preliminary judgment rendered in the condemnation proceedings, which was affirmed by this court, without, so far as appears from the opinion in that case, any objection upon that ground urged by these plaintiffs.

2. It is contended with some show of plausibility that the failure of defendant to enter the mandate of

this court to pay the award and to obtain a final judgment of condemnation for a period of over 27 months after the preliminary judgment of the Circuit Court in the condemnation proceedings constituted an abandonment of such proceedings. It is thoroughly established by the decisions that, where a preliminary judgment fixing the amount of compensation to be paid the owners of property is rendered, it is incumbent upon the corporation to pay that amount within a reasonable time, and thus secure a final order, or it will be deemed to have abandoned the proceedings; the unreasonable delay being considered conclusive evidence of an intent not to accept the property upon the terms and at the valuation by the court or jury: *Bensley v. Mountain Lake Water Co.*, 13 Cal. 306 (73 Am. Dec. 575); *Chicago v. Barbican*, 80 Ill. 482. A judgment fixing the value of the land is not in this state an authorization to the party condemning to take possession of the premises. It merely puts such party in a position where by paying into court the ascertained value of the tract sought to be condemned he can thereafter use the property for the purpose for which condemnation is sought. Since this is true, the defendant was not authorized by virtue of its preliminary judgment fixing the amount to be paid to take possession of the land sought to be condemned, without complying with the law requiring the value ascertained by the court to be paid to the clerk for the owners or others whose interests entitle them to compensation.

3. Nor are we of the opinion that the fact that the plaintiffs here promptly appealed from the preliminary judgment assessing damages dispensed with the necessity of the railway corporation's paying over to the clerk the damages assessed. It is true that Section 7104, Or. L., provides that such appeal "shall not stay

the proceedings so as to prevent such corporation from taking such lands into possession and using them for the purposes of the corporation," etc. But, before doing so, the compensation must be "first assessed and tendered," as required by subdivision 18 of Article I of the Oregon Constitution.

4. Whether the failure of plaintiffs to object to the corporation's taking immediate possession and constructing its road upon the strip in controversy amounted, under the circumstances, to a license so to do, is not material in view of the fact that no damages have been shown to have resulted from the act, and further taking into the account the fact that plaintiffs received interest upon the amount of the original assessment, to which interest they were not morally or legally entitled, inasmuch as the delay in the final adjudication was caused in great part by their groundless appeal.

5. Returning now to the question of abandonment, it may be said that abandonment is largely a matter of intent, and that intent is to be deduced from the acts of the party. The defendant has not shown any intent to abandon the proceedings, except that it delayed entering the mandate of this court for a period of about nine months after our decision was handed down. It promptly took possession of the strip pending the appeal and built and operated its road thereon. The defendant did not bring the case here, and probably it took the position that it was the duty of the parties who brought it to get it back into the Circuit Court so that they could collect their damages. We do not think that the delay under the circumstances was so unreasonable as to justify us in saying as a matter of law that the defendant here had abandoned the proceedings, especially as the plaintiffs have not shown

any injury resulting to them from such delay. The plaintiffs prosecuted a groundless appeal and are responsible for much of the delay. But for that appeal, no doubt they would have had their damages long ago.

The judgment is affirmed.

AFFIRMED. REHEARING DENIED.

BURNETT, HARRIS and JOHNS, JJ., concur.

Argued October 8, reversed as to Dudley and affirmed as to Wilson December 7, 1920, rehearing denied January 18, 1921.

BLAKE-McFALL CO. v. WILSON.

(193 Pac. 902.)

Fixtures—Annexation, Adaptation and Intention, the Three Tests to be Applied.

1. Ascertainment of whether personalty has been transferred into realty requires the united application of three tests: Annexation, adaptation and intention.

Fixtures—Freight Elevator Held a Fixture.

2. Freight elevator bolted and attached to building and installed in the manner that freight elevators are usually installed by owners for the sole purpose of serving the building with the intention to take the elevator with them if they ever moved but without a definite intention to move at the time of its installation, *held* a fixture in suit against purchaser.

Fixture—Considerations, in Ascertaining Intention of Party Making Annexation, Stated.

3. The intention of the party making the annexation as to whether the personalty affixed is to constitute a fixture is to be inferred from the nature of the article affixed, the relation and situation of the party making the annexation, the construction and mode of annexation, and the purposes and use for which the annexation has been made.

Fixtures—More Liberal Rule Applied When Annexation is by Tenant Than When Made by Owner.

4. In ascertaining intention of party who made annexation, a more liberal rule is applied when the annexation is made by a tenant than when made by the owner, and an article annexed to the land may be regarded as a trade or domestic fixture, and therefore as personalty, if annexed by a tenant, but may be treated as realty if annexed by the owner.

Evidence—Deed Conveys Fixture Notwithstanding Parol Exception.

5. A conveyance of real estate will pass the fixtures thereto annexed if there is no exception in the deed of conveyance, notwithstanding a parol exception at the time of the sale, since to give effect to such parol agreement would vary the terms of a written deed.

Deeds—Contract Merged in Deed.

6. Generally, a contract to convey land is merged in a deed executed in performance thereof, and the deed operates as a satisfaction and discharge of the executory contract.

Fixtures—Elevator Excepted from Conveyance by Contract Did not Pass by Subsequent Deed Containing No Exception.

7. Deed did not pass title to freight elevator, though there was no exception stated, where contract executed prior to conveyance excepted the elevator, since such contract operated, as between the parties, to reimpress the elevator with the character of personalty.

Fixtures—Parties can Agree That a Chattel shall Retain Its Character as Personalty.

8. Parties can agree that a chattel shall continue to retain its character as personalty, and, though attached in such manner that without such agreement it would lose its character as a chattel, the agreement will be given effect, as between the parties at least, and the chattel will be deemed to retain its character as personalty, if it can be removed without material injury to the article itself or to the freehold.

Fixtures—Grantee Conveying to Third Party Without Excepting Elevator to Which Grantor had Retained Title Liable to Grantor for Conversion.

9. Where deed failed to pass title to elevator by reason of previous contract between the parties reimpressing elevator with the character of personalty, the subsequent conveyance of the building by grantee to third party, who had no knowledge that elevator was not a fixture and that grantee had no title thereto, constituted conversion of elevator by grantee, rendering grantee liable to grantor for value of elevator as it constituted part of the building and not its value as torn down for removal, since the conveyance to innocent third party passed title to the elevator.

Fixtures—Tenant cannot Remove Fixtures After Expiration of Term.

10. Generally, a term tenant cannot remove fixtures after the expiration of his term, and the landlord becomes the absolute owner on tenant's surrender of premises without removal of fixtures, since tenant by failing to remove fixtures abandons the right to so do.

8. On the question of chattels attached to land retaining the character of personalty by agreement, see notes in 84 Am. St. Rep. 878, and 1 Ann. Cas. 312.

10. On effect of renewing tenancy without reserving right to remove fixtures, see notes in 3 Ann. Cas. 331; 20 Ann. Cas. 769; 1 J. E. A. (N. S.) 1193; 17 L. R. A. (N. S.) 1135; 48 L. R. A. (N. S.) 294.

Fixtures—Tenant's Right of Removal not Abandoned Where He Continues in Possession Under New Lease.

11. The rule that a tenant is required to remove fixtures before expiration of his term or abandon the right to removal does not apply where the lease is renewed for a new term, and the new lease does not *per se* extinguish the right of the tenant to remove fixtures installed by him under immediately preceding lease.

From Multnomah: CALVIN U. GANTENBEIN, Judge.

Department 1.

Blake-McFall Company, a corporation and a wholesale dealer in paper, stationery, and wooden and willow ware, brought this action against Samuel F. Wilson, Eugene A. Dudley, and Jessie Dudley, his wife, for the conversion of an Otis elevator which had been installed in a building originally erected by the plaintiff but subsequently conveyed by the corporation to Samuel F. Wilson and Eugene A. Dudley. The plaintiff claims that the elevator was personal property by force of an agreement. The defendants argue that the elevator was an irremovable fixture and a part of the realty.

The Blake-McFall Company owned the southwest corner of the block at Fourth and Ankeny Streets in Portland. The plaintiff constructed a six-story building on the land owned by it. The plaintiff moved into the building immediately upon its completion in 1910.

When the plaintiff erected the building, it did so with a view of occupying only a portion of it and renting the remainder; and, accordingly, when the plaintiff moved into the building it used only a portion of the structure, and the rest of the building was rented to tenants. When the building was erected, and as a part of its construction, two freight elevators were installed for the use of both the owner and the tenants. These two elevators served every floor in the building, from the basement to the sixth story. The plaintiff

purchased from the Otis Elevator Company a circular merchandise chute and caused it to be installed at the time of the construction of the building. This chute was designed for the sole use of the plaintiff; it extended from the basement to the fourth floor, and was located in that part of the building which was occupied exclusively by the plaintiff.

The chute proved to be unsatisfactory for the reason that it frequently delivered goods in a damaged condition; and when the plaintiff complained to the Otis Elevator Company that the chute had failed to fulfill the guaranty of the seller, the Otis Elevator Company offered to install a freight elevator in place of the chute; and, accordingly, in 1911 the chute was removed and the elevator was substituted. This elevator is the subject of this litigation.

In June, 1912, the plaintiff and the defendant Samuel F. Wilson entered into a written contract under the terms of which the latter agreed to purchase the premises owned by the plaintiff at Fourth and Ankeny Streets. The contract contained a stipulation by which Wilson agreed to accept the premises with the understanding that the elevator, now in controversy, and a certain merchandise chute (other than the one which was removed) and two sheet-iron slides, "are not included in the equipment of the building," and "also that no shelving, counters, or fixtures belong to the building." Although the contract for the sale of the premises was made between Blake-McFall Company and Wilson, the contract was carried out by the Blake-McFall Company delivering a deed, dated July 31, 1912, to the two defendants, Eugene A. Dudley and Samuel F. Wilson. This deed made no reference to the elevator and contained no provision excepting it from the operation of the conveyance.

Although the record does not disclose just when the Blake-McFall Company determined to build a "new home," it does fairly appear from the transcript of testimony that the company had at some time before making the contract with Wilson concluded to sell the premises at Fourth and Ankeny Streets and to construct for its use another building at some other location in the city. After conveying to Dudley and Wilson, the plaintiff continued to occupy the building; but it did so as the tenant of Dudley and Wilson.

In September, 1913, the Hughes Investment Company, a corporation, began negotiations with Wilson and Dudley for the purchase of the premises bought by them from the plaintiff; and as a result of these negotiations the three defendants, Samuel F. Wilson and Eugene A. Dudley and the latter's wife, Jessie Dudley, on October 1, 1913, deeded the property to the Hughes Investment Company. The deed to the Hughes Investment Company did not except the elevator from the conveyance. Moreover, none of the representatives of the Hughes Investment Company had any notice that the plaintiff claimed that the elevator had been reserved as personal property when Wilson and Dudley purchased the premises; and, indeed, it was not until the late fall of 1914 that any representative of the Hughes Investment Company was apprised of the claim of the plaintiff. After the property was conveyed to the Hughes Investment Company, the plaintiff continued to occupy the building; but it did so as the tenant of the Hughes Investment Company. The terms of the plaintiff's tenancy, so far as they related to the rentals to be paid, the time of occupancy and steps to be taken if either the landlord or the tenant wished to terminate the tenancy, were the same under the Hughes Investment Company as they were when

the plaintiff was occupying the building under Dudley and Wilson.

On February 27, 1914, the plaintiff notified the Hughes Investment Company of its intention to terminate the lease; but instead of ending the tenancy the parties made a new lease in December, 1914, and this last lease was not terminated until August, 1915, when the plaintiff moved into a new building which it had constructed for its use.

On April 18, 1915, a fire occurred in the building at Fourth and Ankeny Streets and so damaged the elevator in controversy that it could not be used. The Hughes Investment Company carried insurance on the building. The Blake-McFall Company held an insurance policy covering the elevator. A suit was begun to determine whether the plaintiff or the Hughes Investment Company was entitled to collect the insurance money due on account of the elevator. That suit resulted in a decree awarding the money to the Hughes Investment Company, for the reason that the latter had purchased the premises without any notice of plaintiff's claim that it owned the elevator. Soon after the rendition of the decree in that suit, the plaintiff commenced this action.

At this point in the narrative it is appropriate to state that under date of April 29, 1915, Wilson wrote, signed, and delivered to the plaintiff a letter saying:

"Confirming my conversation with your Mr. Bruun in reference to the ownership of the elevator located near the south wall in the building No. 41 Fourth St., and regarding the merchandise chute located near the north wall in the building No. 47 Fourth St., I beg to say that this property, under our agreement dated June 7th, 1912, was reserved by and belongs to you and not to the owner of the building.

"Trusting this statement may enable you to satisfy insurance adjusters, I remain,"

The parties consenting, this cause was tried without the aid of a jury. The Circuit Court found:

"That by express agreement between the plaintiff and the defendants said elevator was personal property with the right on the part of the plaintiff to remove the same at any time from said building."

The trial court also found that the elevator was so attached as to become a part of the real property "as against a purchaser" for value and without notice "of the agreement between the parties hereto by which said elevator retained its character as personalty; that it was of such construction and so annexed and attached to the building and the real property that it could be removed without substantial or permanent injury to the building or real property." Based upon these findings and the added finding of the fact that the defendants sold the premises without notifying the Hughes Investment Company of the agreement reserving the elevator, the court concluded that the defendants were liable for the conversion of the elevator, and the plaintiff was entitled to a judgment; and, accordingly, a judgment was entered against the defendants, and they appealed.

REVERSED as to Eugene A. Dudley and Jessie Dudley.

AFFIRMED as to Samuel F. Wilson.

For appellants there was a brief over the name of *Messrs. Winter & Maguire*, with an oral argument by *Mr. J. P. Winter*.

For respondent there was a brief over the names of *Messrs. Chamberlain, Thomas, Kraemer & Humphreys*,

Mr. Wm. S. Nash, and Mr. S. J. Graham, with an oral argument by Mr. Warren E. Thomas.

HARRIS, J.—What was the character of the elevator in June, 1912, when the plaintiff agreed to sell and Wilson agreed to buy the premises at Fourth and Ankeny Streets? Was the elevator personalty, or was it realty? If the elevator, notwithstanding its installation in the building, had never lost its character as personal property, then it may be assumed that it was competent for the plaintiff and Wilson to agree, either by parol or in writing, that the elevator should continue to remain personalty and beyond the grasp of the deed. If such was the quality of the elevator, then Wilson and the plaintiff contracted to except from the deed an article which always had been and was then in truth personal property; and, hence, in that situation the contract would be binding at least as against Wilson, although it might not be binding as against Dudley if he purchased without knowledge of the actual character of the elevator and without notice of the agreement. If, however, the elevator lost its character as personalty and was transformed into realty when it was placed in the building, then we have to deal with a problem which is not easy of solution.

1, 2. In this, as in most jurisdictions, the rule for determining whether personalty has been transformed into realty requires the united application of three tests: (1) Annexation; (2) adaptation; and (3) intention: *Johnson v. Pacific Land Co.*, 84 Or. 356, 361 (164 Pac. 564); *Roseburg Nat. Bank v. Camp*, 89 Or. 67, 74 (173 Pac. 313); *Ewell on Fixtures* (2 ed.), 439. And after applying these tests it will be difficult to avoid the conclusion that the elevator lost its character as personalty and was transmuted into realty. The

president of the Blake-McFall Company testified that the elevator "was put in in the usual manner that elevators are installed." The superintendent of the Otis Elevator Company, who had charge of the installation of the elevator, explained that the elevator in question was installed in the same manner as the other two freight elevators which had been placed in the building at the time of its construction, and that it "was bolted" and attached "thoroughly permanent," and that "to tear the thing out, it would leave the building in a somewhat dilapidated condition," because "the floors would have to be recovered; the hatchway would have to be refloored over where the well-hole had been put in, and the timbers would all have to be taken out, of course, that had been placed in there to support the machine."

The elevator was used by the plaintiff and it was adapted to the purpose for which it was designed.

3, 4. The intention of the party making the annexation is, under modern authorities, the most important element. The intention is to be inferred from the nature of the article affixed, the relation and situation of the party making the annexation, the construction and mode of annexation, and the purposes and use for which the annexation has been made; and one of the most important and influential of these factors which must be considered when seeking to ascertain the intention is the relation and situation of the party making the annexation. A more liberal rule is applied when the annexation is made by a tenant than when made by the owner of the land; and, consequently, a given article annexed to the land or to a building on the land may, on the one hand, be regarded as a trade or domestic fixture, and therefore as personalty, if

annexed by a tenant, and, on the other hand, be treated as realty if made by the owner.

Subject to certain recognized limitations, an annexation not intended to be permanent will not transform an article of personal property into realty; but, in order to discover whether the annexation was intended to be permanent, the mode of annexation may be considered and also whether the annexation is to make the chattel on the land more useful. Here the elevator was installed for the sole purpose of serving the building; and although the elevator in controversy, if installed by a tenant, might in some circumstances be treated as a trade fixture, yet, since it was installed by the owner of the land, it must, in the circumstances thus far narrated, be treated as having been converted into realty the moment it was placed in the building; and therefore as between the grantor, Blake-McFall Company, and the grantees, Wilson and Dudley, the deed operated to convey the elevator to the grantees, unless it was legally kept from the embrace of the deed.

In addition to the facts already related there is another circumstance which must be noticed, although it does not affect the result. The president of the plaintiff corporation testified as follows:

“When we decided to sell that building, we decided to sell it because we realized that it was not suitable as a permanent home for our business, and inasmuch as we had expected to take these chutes with us if we ever moved, when we substituted the elevator for one of the chutes we also expected to take the elevator with us.”

This is one way of saying that if they did not move they did not intend to detach the elevator. There is nothing to indicate when it was decided to sell. There is nothing to show the time when the plaintiff's officers realized that the building “was not suitable as a per-

manent home;" and there is nothing to indicate when the officers of the corporation formed the intention or entertained the expectation of taking the chutes with them if they ever moved; and while it is true that according to the president's testimony the representatives of the plaintiff did, when they caused the installation of the elevator, expect to take the elevator with them "if" they "ever moved," there is nothing to show that they had then concluded to move. Indeed, the inferences fairly to be drawn from the record are that the company had not yet decided to move, for it must be remembered that the plaintiff had constructed this building for its own use and had moved into it immediately upon its completion in 1910; and the elevator was installed in 1911, a year afterwards. At the most, the intention, whenever formed by the corporation through its officers, was contingent, unexecuted, and inchoate, and hence it cannot control the result. In *Snedeker v. Warring*, 12 N. Y. 170, 178, the New York Court of Appeals held:

"The destination which gives to movable objects an immovable character results from facts and circumstances determined by law itself, and could neither be established nor taken away by the simple declarations of the proprietor, whether oral or written."

This rule was approved in *Wadleigh v. Janvrin*, 41 N. H. 503 (77 Am. Dec. 780). To the same effect are *Horne v. Smith*, 105 N. C. 322 (11 S. E. 373, 18 Am. St. Rep. 903); *Enterprise M. & M. Co. v. Cunningham*, 84 Or. 319, 323 (165 Pac. 224). Indeed, the plaintiff concedes in its printed brief that the secret intention with which chattels are attached does not govern, but that the controlling intention is that "which the law deduces from all the circumstances of the annexation." As between Blake-McFall Company, the grantor, and

Wilson and Dudley, the grantees, the elevator having been placed in the building by the owner and being in it at the time of the conveyance, it passed to the grantees as a part of the realty, unless it was legally excepted from the operation of the deed.

The plaintiff contends that even though it be decided that the elevator must be treated as realty because of the circumstances in which it was installed by the owner of the building, nevertheless it was legally excepted from the deed; and to support its contention the plaintiff relies upon the stipulation found in the written contract of June, 1912, between the plaintiff and Wilson, the letter written to Blake-McFall Company by Wilson under date of April 29, 1915, and parol evidence to the effect that when the deed was delivered it was understood by the parties that the elevator was excepted from the operation of the deed. The defendants attack the position taken by the plaintiff by arguing that the parol evidence was incompetent and must be excluded from consideration; and that the stipulations in the contract of June, 1912, were merged in the deed which was subsequently made in pursuance of the contract, and that, consequently, the deed is the only writing by which the rights of the parties can be measured.

Appellate courts disagree upon the question as to whether parol evidence is competent. There is an abundance of highly respectable authority for saying that the grantor may avail himself of parol evidence to show an oral agreement between himself and the grantee reimpressing the character of personalty upon a given article, where by annexation it had previously become a fixture and a part of the realty, and excepting it from the operation of the deed: *Foster v. Mabe*, 4 Ala. 402 (37 Am. Dec. 749); *Russell v. Meyer*, 7 N. D

335, 342 (75 N. W. 262, 47 L. R. A. 637); *Harlan v. Harlan*, 20 Pa. 303; *Shell v. Haywood*, 16 Pa. 523; 19 Cyc. 1050. See, also: *Tyson v. Post*, 108 N. Y. 217 (15 N. E. 316, 2 Am. St. Rep. 409); *Fuller v. Tabor*, 39 Me. 519; 11 R. C. L. 1064; notes in 84 Am. St. Rep. 878; 13 Am. St. Rep. 153 and 572.

5. There is likewise an abundance of respectable authority for the view that a fixture which has taken on the character of realty, by reason of annexation by the owner of the land, cannot by parol be excepted from the operation of a deed conveying the land upon which the fixture is located: *Noble v. Bosworth*, 19 Pick. (Mass.) 314; *Leonard v. Clough*, 133 N. Y. 292 (31 N. E. 93, 16 L. R. A. 305); *Laird v. Railroad*, 62 N. H. 254 (13 Am. St. Rep. 564, 565); *Wadleigh v. Janvrin*, 41 N. H. 503 (77 Am. Dec. 780); *Horne v. Smith*, 105 N. C. 322 (11 S. E. 373, 18 Am. St. Rep. 903); 2 Devlin on Real Estate (3 ed.), 2300; 11 R. C. L. 1092. See, also: 19 Cyc. 1050; 11 R. C. L. 1064, 1066; 8 R. C. L. 1093; *Johnston v. Philadelphia Mtg. etc. Co.*, 129 Ala. 515 (30 South. 15, 87 Am. St. Rep. 75); *Beeler v. C. C. Mercantile Co.*, 8 Idaho, 644 (70 Pac. 943, 1 Ann. Cas. 310, 60 L. R. A. 283). Some authorities which exclude the admission of evidence of a parol agreement do so upon the ground that the agreement must be in writing in order to satisfy the statute of frauds; others say that a parol exception has the effect of varying the terms of the written deed; and still others rest this conclusion upon both grounds, and hold that a parol exception violates the statute of frauds and also varies the terms of the written deed. We quite agree with Dr. Ewell that:

“The better opinion seems clearly to be that a sale and conveyance of the real estate will (there being no

exception in the deed of conveyance) pass the fixtures thereto annexed, notwithstanding a parol exception thereof at the time of such sale": Ewell on Fixtures (2 ed.), 515.

If personalty has been transformed into realty, then logically it ought to be governed by the rules which control realty. The precedents which reach the conclusion that a fixture may by a parol agreement be constructively reconverted from realty into personalty do so only by adopting artificial and arbitrary premises. Moreover, the universal rule is that, in the absence of an agreement, a fixture which has taken on the character of realty passes with a conveyance of the land and that it passes by force of the writing. If, then, the writing enforces a transfer of the fixture, the force of the writing is opposed and the terms of it are necessarily contradicted by any agreement which purports to withdraw such fixture from the operation of the deed; and therefore, if that agreement rests in parol, it inevitably results in an attempt by parol to vary the terms of the written deed.

The plaintiff points to *Muir v. Jones*, 23 Or. 332, (31 Pac. 646, 19 L. R. A. 441), and argues that this court has at least impliedly given assent to the parol exception doctrine. The syllabus which precedes the reported opinion probably carries the implication suggested by the plaintiff; but a careful analysis of the opinion will disclose that the question involved here was there expressly excluded from consideration. In *Muir v. Jones*, the appeal involved an instruction given to the jury. This instruction consisted of two parts. In the first part the court told the jury that if, when the owner sold the land, she by parol reserved to herself the sawmill, engine and boiler and the right to remove the same, and if defendant had

notice of such reservation, the owner could recover. In the second part of the instruction the court charged the jury that if the owner suffered the sawmill, engine, and boiler to remain on the premises and the defendant had no notice of a reservation, then the defendant would not be bound by such reservation, and the mill, engine, and boiler, would pass to the defendant with the conveyance of the real property. In the opinion attention is expressly called to the fact that—

“No exception was taken to the first part of this instruction, but only to that portion of it which declares that the engine and boiler, when so attached to the soil as to become a part of the realty, pass to the grantee with the conveyance, unless he had notice of the intention to preserve them as personal property and reserve them from the operation of the conveyance.”

Judgment for the defendant was affirmed on the ground that he was a *bona fide* purchaser without notice. Thus it is seen that the controversy in *Muir v. Jones* did not require a decision of the point presented here; and, moreover, the court there took the precaution of saying that the point was not saved by an exception.

It must be remembered that we are not now dealing with an article which by reason of an agreement or by force of attending circumstances has always been personal property and never changed from personalty into realty. If the elevator had never been caused to take on the quality of realty, quite a different situation would be presented. But we are dealing with a subject which, as we have determined, took on the character of realty when the owner annexed it to the building on its land. We are unable to concur with counsel for the plaintiff. We think that the parol exception doctrine is, in the end, fraught with danger to prop-

erty owners; for under that doctrine every ordinary warranty deed would be subject to attack by parol exceptions. The very purpose of a written conveyance is to secure safety and security in ownership. We think that it is better to hold fast to safe and tried moorings than to adopt a rule which will set adrift upon an uncharted sea every ordinary warranty deed and abandon every one of them to the hazard of collision with uncertain and unknown but always possible parol exception derelicts: *Bronson on Fixtures*, § 65c.

As between grantor and grantee the strict rule of the common law prevails, and all fixtures annexed to the realty pass by a conveyance of the freehold, unless they have been excepted from the conveyance in some manner sanctioned by the law: *Noble v. Bosworth*, 19 Pick. (Mass.) 314; *Wolff v. Sampson*, 123 Ga. 400 (51 S. E. 335); 11 R. C. L. 1067, 1068. Since, as we hold, the law does not sanction a parol agreement, it follows that the elevator was not legally excepted from the deed, unless the written contract of June, 1912, had that effect.

The contention of the defendants is that the contract of June, 1912, together with all its stipulations, was merged in the subsequent deed which was executed in performance of the contract; that by reason of such merger the contract was extinguished so that it is not now existent; and that, therefore, the deed is now the only writing by which the rights of the parties can be determined. The defendants are not without authority for their position, for the following precedents support their contention: *Bond v. Coke*, 71 N. C. 97, 99; *Clifton v. Jackson Iron Co.*, 74 Mich. 183 (41 N. W. 891, 16 Am. St. Rep. 621); *Noble v. Bosworth*, 19 Pick. (Mass.) 314.

6, 7. Stated broadly, the general rule is that a contract to convey land is merged in a deed executed in performance of such contract and the deed operates as a satisfaction and discharge of the executory contract: 2 Devlin on Real Estate (3 ed.), § 850a; 27 R. C. L. 529. There is a class of cases, however, where it is held that, if the preliminary contract contains a stipulation of which the conveyance is not a performance, such stipulation survives and is not merged in the deed: 27 R. C. L. 532; 2 Devlin on Real Estate (3 ed.), § 850b. In other words, the deed effects a merger to the extent that it is contemplated that a deed shall be a performance of the contract. Concrete illustration of this doctrine is found in *Brunswick Const. Co. v. Burden*, 116 App. Div. 468, (101 N. Y. Supp. 716), where the facts, in all essential particulars, were like those here. However, we do not decide whether this rule is applicable to the present controversy; for in our view the written contract signed by the plaintiff and Wilson operated, as between them, to reimpress the elevator with the character of personalty.

8. The established rule is that before annexation, interested parties can agree that a chattel shall continue to retain its character as personalty, and, although such chattel is attached to the realty in such manner that without such agreement it would lose its character as a chattel, the agreement will be given effect, as between the parties at least, and the chattel will be deemed to retain its character as personalty, if it can be removed without material injury to the article itself or to the freehold: *Henkle v. Dillon*, 15 Or. 610, 615 (17 Pac. 148); *Landigan v. Mayer*, 32 Or. 245, 250 (51 Pac. 649, 67 Am. St. Rep. 521); *Alberson v. Elk Creek Gold Min. Co.*, 39 Or. 552, 559 (65 Pac. 978); *Johnson v. Pacific Land Co.*, 84 Or. 356, 361

(164 Pac. 564); *Roseberg Nat. Bank v. Camp*, 89 Or. 67, 75 (173 Pac. 313); 1 *Tiffany on Real Property*, 542; *Fuller-Warren Co. v. Harter*, 110 Wis. 80 (85 N. W. 698, 84 Am. St. Rep. 867, 53 L. R. A. 603). Under the finding of fact made by the trial court to the effect that the elevator could have been removed without substantial injury, it would have been competent, for example, for a landlord and a tenant to agree that an elevator similarly installed and used by the tenant should preserve its character as personalty.

So, too, the parties interested can accomplish after annexation what they could have accomplished before annexation.

When the plaintiff and Wilson agreed that the elevator should not be "included in the equipment of the building" and "that no shelving, counters or fixtures belong to the building," they at that moment agreed to treat the elevator as personal property; and, consequently, although not physically detached, it was thereupon constructively detached, and thenceforth it was, as between Wilson and the plaintiff, personal property. It was competent for the parties to make a collateral agreement respecting the elevator. The law did not require all the stipulations to be in a single writing. When the deed was executed, it operated only upon realty; personal property was beyond its grasp. The deed conveyed the land, and every annexed article which at the time of the delivery of the deed possessed the quality of realty; it did not transfer personalty; and therefore, since the preliminary written agreement had already reconverted the elevator from realty and reimpressed it with the character of personalty, at least as between the plaintiff and Wilson it was personal prop-

erty and as such was not transferred by the deed: *Brunswick Const. Co. v. Burden*, 116 App. Div. 468 (101 N. Y. Supp. 716); *Power v. Garrison*, 141 Ga. 429 (81 S. E. 225); *Richards v. Gilbert*, 116 Ga. 382 (42 S. E. 715); Ewell on Fixtures (2 ed.), 470; Bronson on Fixtures, § 55b; 1 Jones on Mortgages (6 ed.), § 431a; 11 R. C. L. 1064, 1066; *Robinson Codfish Co. v. Porter Fish Co.*, 75 Wash. 181 (134 Pac. 811); *Foster v. Mabe*, 4 Ala. 402 (37 Am. Dec. 749); *Tyson v. Post*, 108 N. Y. 217 (15 N. E. 316, 2 Am. St. Rep. 409); *Johnston v. Philadelphia Mtg. etc. Co.*, 129 Ala. 515 (30 South. 15, 87 Am. St. Rep. 75).

The plaintiff relies upon the conveyance from Wilson and the Dudleys to the Hughes Investment Company to prove a conversion of the elevator by the defendants. The defendants assert that this conveyance did not amount to a conversion, and in support of their position cite *Walsh v. Sichler*, 20 Mo. App. 374. The facts reported in that precedent are dissimilar to the facts here. That case involved trade fixtures installed by a tenant during his tenancy. The purchasers and subsequent landlords were advised of the lease and knew of the tenancy; and the original owner and landlord neither knew that these fixtures had been placed in the building nor intended to convey anything that belonged to the tenant. The purchasers informed the tenant that they had bought the premises and forbade him from removing the fixtures as they claimed that the fixtures passed with the deed. "After this, the plaintiff voluntarily quit the premises, leaving the fixtures in the house." Manifestly, the conveyance by the original owner did not operate as a conveyance of the trade fixtures which had been installed by the tenant.

9. In the instant case, however, the elevator became personal property only by force of an express agreement; and, moreover, as to all persons without knowledge of that agreement the elevator was indubitably realty. When, therefore, Wilson and the Dudleys made a deed to purchasers without notice of the agreement, the inevitable effect of the deed was to transfer the elevator to such purchasers, and it was then beyond the power of the plaintiff to avoid the effect of that deed. Since, in the circumstances, the deed irresistibly operated to convey the elevator, Wilson as a maker of the deed in reason and on authority must be deemed to have treated the elevator as his property and hence converted it to his own use: 19 Cyc. 1074; *Smyth v. Stoddard*, 203 Ill. 424 (67 N. E. 980, 96 Am. St. Rep. 314); *Bircher v. Parker*, 43 Mo. 443. See, also: *Rosenau v. Syring*, 25 Or. 386, 390 (35 Pac. 844); *Eldridge v. Hoefer*, 45 Or. 239, 244 (77 Pac. 874); Bronson on Fixtures, § 378; Ewell on Fixtures (2 ed.), 650.

10. It is next argued by the defendants that, by entering into a new lease with the Hughes Investment Company after it had purchased the premises, the plaintiff lost its right to move the elevator, even though it be decided that such right previously existed. The general rule is that a term tenant cannot remove fixtures after the expiration of his term; and the prevailing doctrine is, too, that the landlord becomes the absolute owner of fixtures if the tenant surrenders the premises without removing the fixtures. The right to remove a fixture may, like many other rights, be abandoned or waived; and, consequently, when the tenant's term ends and his right to possession terminates and he leaves fixtures on the premises, he is deemed to have waived his right and

abandoned the fixtures: 11 R. C. L. 1071. As a supposed outgrowth of this general rule, the doctrine has arisen in many, and indeed in most, jurisdictions that, if a new lease is taken without reserving the right to remove fixtures installed during the term of the old lease, such fixtures cannot be removed by the tenant during or at the end of the new lease, notwithstanding the new lease began contemporaneously with the end of the old lease and the tenant has had actual and continuous possession of the premises from the beginning of the old lease until the expiration of the new lease: *Wadman v. Burke*, 147 Cal. 351 (81 Pac. 1012, 3 Ann. Cas. 330, 1 L. R. A. (N. S.) 1192); 11 R. C. L. 1072.

Under this doctrine, if the new lease is silent upon the subject of fixtures installed during the old lease, the tenant loses the fixtures, unless he moves them out of the building before the end of the old lease, notwithstanding the fixtures are his property at the very moment the new lease is executed and in spite of the fact that he not only does not intend to abandon them but supposes that they continue to be his property when the new lease begins, and in despite of the fact that not a single moment of time intervenes giving the landlord the right of possession; but if, however, an hour before the end of the old lease the tenant loads his fixtures on a truck and one minute before the expiration of his old term carries them around the block and then one minute after the beginning of the new term returns with them and re-installs them, they continue to be his property with the accompanying right of removal. Judge COOLEY, whose uncommon fund of common sense has so greatly enriched American jurisprudence, has pertinently said:

“What could possibly be more absurd than a rule of law which should in effect say to the tenant who is about to obtain a renewal: ‘If you will be at the expense and trouble, and incur the loss, of removing your erections during the term, and of afterward bringing them back again, they shall be yours; otherwise you will be deemed to abandon them to your landlord’ ”: *Kerr v. Kingsbury*, 39 Mich. 150 (33 Am. Rep. 362).

11. There may, of course, be circumstances attending the execution of a new lease showing an intention to abandon the right to remove fixtures; but, it seems to us, a rule which declares that a new lease of its own force operates as an abandonment of fixtures installed under an old lease is without the support of any substantial or persuasive reason. In practice this rule is a trap and a snare for the unwary tenant, for in the every-day affairs of life most tenants making a new lease would assume, and indeed so would most landlords, that fixtures which were the property of the tenant during the old lease would continue to be the property of the tenant under the new lease. In our view, the reasons which give support to the rule that the failure of a term tenant to remove his fixtures before the expiration of his term and the extinguishment of his right of possession are not present when the lease is immediately followed by a new lease and the tenant's possession, actually and rightfully, has been continuous and without interruption; and, since the reasons for the rule do not exist, the rule itself ought not to exist. We hold that a new lease does not *per se* extinguish the right of the tenant to remove fixtures installed by him under an immediately preceding lease. This view is supported by the following precedents: *Kerr v. Kingsbury*, 39 Mich. 150 (33 Am. Rep. 362); *Bergh v. Herring-Hall*

Marvin Safe Co., 136 Fed. 368 (69 C. C. A. 212, 70 L. R. A. 756); *Thomas v. Gayle*, 134 Ky. 330 (120 S. W. 290, 135 Am. St. Rep. 412, 20 Ann. Cas. 766, 28 L. R. A. (N. S.) 767); *Sassen v. Haegle*, 125 Minn. 441 (147 N. W. 445, 52 L. R. A. (N. S.) 1176); *Radey v. McCurdy*, 209 Pa. 306 (58 Atl. 558, 103 Am. St. Rep. 1009, 67 L. R. A. 359).

The judgment was against the three defendants. The facts as disclosed by the record are not sufficient to sustain a judgment against Eugene A. Dudley or his wife. However, Wilson cannot escape liability.

When Wilson converted the elevator it was annexed to the building. When the elevator was sold to the Hughes Investment Company, it was disposed of as a part of the building and presumably was paid for as a part of the building; and, hence, Wilson became liable for the value of the elevator as it then was,—“not its value as torn down for removal”: *Smyth v. Stoddard*, 203 Ill. 424, 430 (67 N. E. 980, 982, 96 Am. St. Rep. 314).

As against Dudley and his wife, the judgment is reversed; but, as against Wilson, the judgment is affirmed.

AFFIRMED IN PART, REVERSED IN PART.

REHEARING DENIED.

McBRIDE, C. J., and BENSON and BURNETT, JJ.,
concur.

Argued at Pendleton October 28, appeal dismissed December 21, 1920,
rehearing denied January 18, 1921.

FIRST NAT. BANK v. HALLIDAY.

(193 Pac. 1029.)

Appeal and Error—"Adverse Party" as Respects Notice of Appeal Defined.

1. An "adverse party," with reference to the requisite of service of notice of appeal under Section 550, L. O. L., is a plaintiff or defendant whose interest in regard to the judgment or decree appealed from is in conflict with a reversal or modification of the judgment or decree sought to be reviewed on appeal.

Appeal and Error—In Suit to Set Aside Fraudulent Conveyance from Mother to Son, Mother Held "Adverse Party" as Respects Son.

2. In suit by judgment creditor of a mother to set aside as fraudulent a conveyance by the mother to the son, where the son appealed from a judgment setting aside the conveyance and subjecting the property to the judgment, subject, however, to a lien in favor of the son for money paid upon a superior mortgage and other claims, the mother, who had appeared in the suit, was, as respects the requirement of Section 550, L. O. L., of service of notice of appeal, an adverse party, and where the son did not serve notice of appeal on her, his appeal must be dismissed.

From Malheur: DALTON BIGGS, Judge.

In Banc.

In substance, this is a suit against Emma H. Halliday and her foster son, Wilbur A. Halliday, to set aside a mortgage and a subsequent deed of certain real property given by the mother to the son, and to subject the same to the payment of a judgment against her in favor of the plaintiff. The land was subject to the lien of a mortgage in favor of Balfour, Guthrie & Company, about the priority of which there is no dispute. The son asserted the validity of the mortgage and deed from the mother. The result of the litigation in the Circuit Court was a decree setting aside the deed and mortgage and subjecting the realty to the payment of the plaintiff's judgment, subject, however, to a lien in favor of the

son for money paid upon the admittedly superior mortgage of Balfour, Guthrie & Company and for some other claims. From this decree the son appealed, but did not serve the notice thereof upon the mother, although she had appeared in the suit. The plaintiff now moves to dismiss the appeal on that account.

APPEAL DISMISSED.

For appellant there was a brief and an oral argument by *Mr. O. B. Mount*.

For respondent there was a brief and an oral argument by *Mr. George W. Hayes*.

BURNETT, J.—1. It is required by Section 550, Or. L., that:

“The party desiring to appeal may cause a notice signed by himself or attorney, to be served on such adverse party or parties as have appeared in the action or suit, or upon his or their attorney * * .”

It is also a rule established by our decisions that an adverse party with reference to the requisite of service of notice of appeal is a plaintiff or defendant whose interest in regard to the judgment or decree appealed from is in conflict with a reversal or modification of the judgment or decree sought to be reviewed on appeal: *Van Zandt v. Parson*, 81 Or. 453 (159 Pac. 1153); *French v. McKean*, 81 Or. 683 (160 Pac. 1151); *In re Waters of Chewaucan River*, 89 Or. 659 (171 Pac. 402, 175 Pac. 421).

2. According to the complaint and resultant decree, Mrs. Halliday is liable on the judgment against her, to the payment of which it is sought by this suit to subject the property in question. The decree thus provides the means for realizing a fund applicable to the payment of her personal obligation. It does not

appear that she is personally obligated for the lien declared in favor of the son or that she is thus bound to him for any debt whatever. She is apparently satisfied with the decree, not having appealed therefrom, while the son is seeking to increase his lien upon the land, and not only so, but also to give it priority over the judgment against her. A modification of the decree complying with his contention would tend to reduce the fund applicable to the payment of her debt. If satisfaction of his lien, increased as he would have it, should result in the exhaustion of the fund or even in the depreciation of it so that the remainder would not fully satisfy the judgment, she would still remain liable personally for the unpaid balance, and her other property, if she has any, might be subjected to its payment. The conclusion is that there is a possibility that her interest will be affected by a modification of the decree according to the contention of the appealing son. She is therefore an adverse party within the meaning of the precedents cited, and the notice of appeal should have been served upon her as such. For want of this, we have no jurisdiction over the case, and the appeal must be dismissed.

APPEAL DISMISSED. REHEARING DENIED.

Argued November 18, 1920, affirmed January 18, 1921.

POYNTZ v. HOLMAN TRANSFER CO.

(194 Pac. 851.)

Master and Servant—Evidence Held Insufficient to Show Agreement to Pay Percentage of Profits for Services.

1. In an employee's action to recover a percentage of profits, claimed to constitute part of his compensation, evidence held insufficient to show that defendant agreed to pay any share of profits in addition to salary paid.

From Multnomah: CALVIN U. GANTENBEIN, Judge.

Department 2.

The defendant is an Oregon corporation, with its principal office in the City of Portland. In November, 1910, M. D. Poyntz was employed as its secretary and cashier, at a salary which was paid from month to month, and he continued in its employ until September 1, 1916. On February 28, 1913, the defendant addressed Poyntz the following letter:

"In line with our recent conversation along the lines of compensation for your services for the current year, beg to confirm herewith as below:

"You to draw monthly salary of two hundred dollars (\$200.00), and at the close of the year's business take 10% of the net profits, if said profits do not equal six hundred dollars (\$600.00), equal to fifty dollars (\$50.00) per month, I then guarantee to pay you the difference to equal said amount, or, in other words, will guarantee you three thousand dollars (\$3000.00) for the year's compensation.

"I further guarantee should your share, including salary, not exceed three thousand dollars (\$3,000.00), to give you as a bonus the sum of one hundred and fifty dollars (\$150.00) additional."

About this time the defendant borrowed \$45,000, upon which it agreed to pay interest at 6% per annum, and used the money to purchase four lots in

Block 205, Couch's Addition to the City of Portland, and since that date has paid the interest, taxes, and other charges levied against the property from and out of its earnings. On January 18, 1911, M. D. Poyntz executed to the defendant his promissory note for \$1,375, payable one year after date, with interest at 6% per annum. On January 18, 1916, the defendant waived the interest then accrued, and this note, with interest from that date, is now due and owing to the defendant. Prior to the commencement of this suit, M. D. Poyntz demanded a settlement and accounting with the defendant, which it refused. All of the records and accounts of the defendant corporation from January 1, 1916, to September 1, 1916, are in its possession and control.

This suit was commenced by M. D. Poyntz on October 25, 1916, in which he prays that the defendant be required to account for the net profits "expended on account of said money borrowed and on account of said real property and for said net profits from the first day of January, 1916, to the first day of September, 1916," and that after offsetting and deducting the amount of the note, plaintiff should then have judgment for the amount of any of the 10% profits remaining. An answer was filed October 28, 1916, in which defendant admits the employment and payment of the 10% profits to January 1, 1915, after which date it alleges that there was no agreement whereby the plaintiff should have, or the defendant should pay, any of the net profits; that the plaintiff kept all the books, rendered all financial statements, and never made any such demand until after he left its employ; that on January 1, 1916, they entered into a new agreement whereby his salary was reduced and he was not to have or receive any portion of the

profits of the business. Defendant also pleads the execution of the note and prays for judgment for its amount, with interest from January 1, 1916, and attorney's fees. M. D. Poyntz died about December 1, 1916, and on November 27, 1917, a reply was filed by Anna M. Poyntz, as administratrix of his estate, in which plaintiff alleges:

"M. D. Poyntz had knowledge that the expenses thereon [meaning the interest and taxes on the real property] were being paid out of the net profits of defendant's business and believed that he would become entitled to, and receive, a 10% interest in the said property when the same was paid for."

Before any testimony was taken, counsel for defendant stated in open court that a demurrer had been filed to the complaint upon the ground that—

It "did not state facts sufficient to constitute a cause of suit in equity; and my point on that is that it is properly a trial at law, * * . It is not a case in equity, does not involve an examination of accounts, and it is not for the purpose of avoiding a multiplicity of suits. * * It should be at law, and I want to reserve my rights on this point."

We assume that such a demurrer was filed, but it is not in the record here.

After the taking of testimony the court found that from December 31, 1914, until September 1, 1916, Poyntz' compensation "was by mutual agreement only a certain salary, with no part of the profits of defendant's business"; that defendant paid him an agreed salary with 10% of the net profits of the business from November 18, 1910, to December 31, 1914; that the purchase of the lots was made for the use and benefit of the defendant in the course of its business, and that Poyntz, as its bookkeeper, entered and carried the amount of the borrowed money as liability

and the interest and taxes as an expense, which he deducted from the gross earnings, and computed the 10% profits, which were paid to him, after such deductions were made. As conclusions of law the court found that during his lifetime Poyntz had been paid in full, and that he was not entitled to an accounting, that the equities were with the defendant, that the suit be dismissed without prejudice and with leave to defendant to pursue its legal remedies on the note, from which plaintiff appeals, claiming that the court erred in dismissing the suit and in refusing to render a decree as prayed for in the complaint.

AFFIRMED.

For appellant there was a brief over the names of *Mr. John C. Veatch* and *Mr. Oscar Furuset*, with an oral argument by *Mr. Veatch*.

For respondent there was a brief over the names of *Messrs. Bauer & Greene* and *Mr. A. H. McCurtain*, with an oral argument by *Mr. Thos. G. Greene*.

JOHNS, J.—1. The complaint alleges that on November 18, 1910, Poyntz entered the employ of the defendant as its secretary and cashier, and that in consideration thereof the company agreed to pay him “a certain salary each and every month, and in addition to said salary to pay to plaintiff 10% of the net profits realized by defendant from the conducting of the aforesaid business.” The defendant admits “that down to about the thirty-first day of December, 1914, defendant paid to plaintiff a certain salary each month and in addition thereto 10% of the net profits of defendant’s business.” The only evidence of any written contract to pay “10% of the net profits” is the letter of February 28, 1913, and it specifies “ser-

vices for the current year"; that Poyntz should draw a monthly salary of \$200, "and at the close of the year's business take 10% of the net profits, * * or, in other words, will guarantee you three thousand dollars (\$3,000) for the year's compensation." This letter specifies and refers to the business for "the current year," which would end on December 31, 1913, and, standing alone, could not be construed as a continuing contract. The defendant contends, and there is some testimony tending to show, that on different terms and conditions other yearly contracts were made with Poyntz, but apparently they were lost or misplaced, and none of them were introduced in evidence. The complaint is founded upon the theory that Poyntz had a continuing contract, and that from November 18, 1910, to September 1, 1916, he was entitled to and should have "10% of the net profits" of the company. The testimony is conclusive that up to January 1, 1915, the company paid, and that Poyntz received, a commission on the net profits of the defendant's business, and that for the year 1914 such profits were \$1,717.07, upon which he was paid 10% or \$171.71. The four lots in Block 205, Couch's Addition to the City of Portland, were purchased on February 1, 1913, upon which the taxes and accrued interest have been paid from and out of the earnings of the corporation. In her reply the plaintiff admits that M. D. Poyntz "had knowledge that the expenses thereon were being paid out of the net profits of defendant's business, and believed that he would become entitled to and receive a 10% interest in said property when the same was paid for." Poyntz was the cashier and bookkeeper of the defendant and had knowledge, control, and supervision of the entries in the books, and the method and manner

in which the books were kept and the entries made. The lots were purchased for the use and benefit of the company, and to be used in connection with, and as a part of, its business. The testimony shows that it was a bad investment, and that after Poyntz left its employ the company offered to sell the property at a loss of \$5,000 and to pay him a commission of \$1,000 if he would find a purchaser. In that transaction there would have been an actual loss of \$6,000 to the company. On January 1, 1915, Poyntz was paid his 10% of the profits for the year 1914. This was nearly two years after the purchase of the lots in February, 1913. During all of that time he had charge of the books, prepared the statements and trial balances, and no entry was ever made which would tend to show that Poyntz had, or claimed to have, a 10% interest in the money which was paid on account of taxes or the interest which was paid on the purchase price of the lots. The only written evidence of his right to 10% of the profits is the letter of February, 1913, which clearly shows that it was a contract for "the current year." In the ordinary course of business it would be usual and customary to have a final settlement at the end of the current year for the previous year's business, and the fact that on January 1, 1915, based upon his own records and statements, Poyntz was paid \$171.71 as 10% of the profits for the previous year's business, is strong evidence that such annual settlements were made, and that he did not then have, or claim to have, any share in the money which the company paid out on account of taxes or interest on the lots. Again, the testimony is undisputed that he did not make any such claim until after he left the employ of the company on September 1, 1916. There is no evidence that the com-

pany prior to that time ever knew of, or in any way recognized, his present claim, and the only testimony on the part of plaintiff concerning such claim relates to conversations between Poyntz and his wife and the witness Charles G. Hayden, who was Poyntz' intimate friend from 1910 to 1916. When analyzed, Hayden's testimony is confined to a conversation had with Poyntz in 1916 after this suit was commenced, in which Poyntz, referring to the four lots, said:

"He had anticipated that he would get some of the benefits from that purchase; that the plan had been that they were to put up a building on this new property and do away with the old barn, sell the property down there, in which case he would come in for quite a substantial portion of the profits on it."

That does not tend to prove plaintiff's case. The testimony of Mrs. Poyntz as to such conversations is, in substance, that:

"He absolutely thought the contract was in effect; * * that that 10% of the profits contract stood and something could be expected from that. * * He expected to share in some way in the interest in this property. * * He said that he could not tell how much would come from that because the business had not been as prosperous as it had been before, and he could not say whether there would be anything from the profits, but he expected there would be something. * *

"Q. The fact of the business, Mrs. Poyntz, all you know about this case, and what you have testified to here to-day, is simply your impressions or memory of what your husband told you in his lifetime?

"A. Yes; what he told me and what impression I have received from what his understanding was; * * that he expected that if the property was used, or in the event that they did not build on it and it was later sold, that he would share in the profits."

There is no evidence that the property was sold, and the record shows that there was a shrinkage in

value of at least \$6,000. Upon the theory of either the complaint or reply, there is a failure of proof.

The decree is affirmed. AFFIRMED.

McBRIDE, BEAN, and BROWN, JJ., concur.

Argued October 6, affirmed November 16, petition for rehearing filed December 10, 1920, denied January 25, 1921.

UNION FISHERMEN'S CO. v. SHOEMAKER.

(193 Pac. 476; 194 Pac. 854.)

Statutes—Construed to Give Effect to Every Clause, if Possible.

1. The courts are required to construe a statute so as to give effect to every clause thereof, if possible.

Statutes—Construed to Ascertain Intention of Legislature.

2. In construing a statute, the intention of the legislature is to be sought, and, if the words are not sufficient to manifest such intention, it is to be ascertained by considering the context, subject matter, the necessity for the law, the circumstances of its enactment, the mischief to be remedied, and the object to be attained.

Statutes—If Intent not Ascertainable, Reasonable Construction Adopted.

3. If the intention of the legislature in enacting a statute cannot be ascertained, the courts should give the statute a reasonable construction consistent with the general principles of law.

Fish—Catching in the Sea Beyond Three-mile Limit and "Outside" of River Means Between Lines Drawn from Headlands.

4. Laws of 1919, page 653, Section 5, prohibiting the sale or possession of salmon taken beyond the three-mile line outside of the Columbia River during the closed season for that river, means fish taken beyond that line between lines drawn from the north and south headlands at the mouth of the river, which construction gives the word "outside" its ordinary meaning of to the exterior of, without, outward from, is definite and certain, and does not lead to absurd results, since the distance between the headlands is seven miles, so that that section does not apply to all fish caught anywhere by fishermen using landing places along the Columbia River as their base.

Constitutional Law—"Police Power" Defined.

5. Police power, is the power to make all laws which, in contemplation of the Constitution, promote the public welfare, and it embraces the inherent sovereign power of the state, within constitu-

tional limitations, to promote the order, safety, health, morals and general welfare of society.

Fish—Game—Protection of Fish and Game is Within Police Power.

6. The preservation of fish and game has always been considered to be within the proper domain of the police power.

Constitutional Law—Final Determination of Limits of Police Power is for Courts.

7. The legislature is not the final judge of the limitations of the police power, and since its action must be reasonably necessary for the public benefit, the validity of all police regulations depends upon the judicial test of reasonableness, though the legislature must primarily determine the necessity or expediency of the measures adopted.

Constitutional Law—Legislature has Large Discretion Under Police Power.

8. The courts, in applying the judicial test of reasonableness to a statute enacted under the police power, will accord to the legislature a large discretion in determining, not only what the public interests require, but also what measures are necessary for the protection of such interests.

Constitutional Law—Statutes Presumed Valid.

9. In applying the test of judicial reasonableness to an act passed under the police power, the presumption is in favor of the reasonableness and validity of the regulation.

Fish—Prohibiting Sale of Fish Caught During Closed Season not Unreasonable.

10. In view of the habits of salmon fish to run in different rivers at different times, so that the closed season to protect them during part of the run must be different for different rivers, Laws of 1919, page 653, Section 5, which prohibits the sale or possession of salmon caught beyond the three-mile limit outside a certain river during the closed season for that river, is not an unreasonable police regulation, because it is unusual, since prohibition of sales of fish and game during the closed season are usual, and the only unusual features of the statute are necessitated by the unusual conditions.

Fish—Can Prohibit Sale of Fish Caught Outside Three-mile Limit.

11. Though a state could not make unlawful the catching of fish beyond the three-mile limit, Laws of 1919, page 653, Section 5, which merely prohibits within the state the sale or possession of fish caught outside such limits, is within the power of the state to make effective its prohibition against taking fish during the closed season from waters over which it has jurisdiction.

Fish—Right to Sell in Other States Does not Invalidate Prohibition.

12. Laws of 1919, page 653, Section 5, prohibiting sale or possession within the state of fish caught beyond the three-mile limit outside the Columbia River, is not invalid as an unreasonable police regulation, which fails to accomplish its purpose because the State of Washington has no similar statute, so that fish caught within

such limits may be sold in that state, and thereby the purpose of the Oregon statute is partially defeated.

Statutes—Regulating Fishing in Particular Stream not Discriminatory.

13. Laws of 1919, page 653, Section 5, is not invalid as discriminatory, and not of general application because it prohibits the sale and possession of fish caught between certain dates only when they are caught within or outside the mouth of the Columbia River.

Commerce—Prohibition of Sale of Fish Caught Outside Limits not Regulation of Foreign or Interstate Commerce.

14. Laws of 1919, page 653, Section 5, prohibiting the sale or possession within the state of salmon caught beyond the three-mile limit outside the Columbia River, does not contravene the foreign and interstate commerce clause of the federal Constitution.

States—Prohibition of Sale of Fish Caught in Closed Season Held not to Violate Agreement With Other State.

15. The agreement between the States of Oregon and Washington, embodied in Laws of 1915, page 233, Section 20, made with the consent of Congress, that neither would, without the consent of the other, enact any law which would conflict with the terms of the compact, which compact was limited to laws and regulations which would affect their concurrent jurisdiction over streams, is not violated by Laws of 1919, page 653, Section 5, prohibiting within the state the sale or possession of fish caught beyond the three-mile line outside the Columbia River during the periods fixed by both states as the closed season for that river.

ON PETITION FOR REHEARING.

Constitutional Law—Wisdom of Legislation is not Question for Courts.

16. Laws of 1919, page 653, Section 5, regulating salmon fishing in the Columbia River and forbidding the use of purse seines, etc., on the Oregon side, cannot be held unconstitutional because the law works harshly against the Oregon canneries, the State of Washington providing no similar restrictions; the wisdom of the act being for the legislature.

From Clatsop: JAMES A. EAKIN, Judge.

Department 1.

The Union Fishermen's Co-operative Packing Company and five other Oregon corporations own and operate in Oregon large salmon canneries at or near the mouth of the Columbia River. The defendant Carl D. Shoemaker was, at the time of the commencement of this suit, the game warden and master fish

warden of the State of Oregon, and it was his official duty to enforce the game and fish laws of this state.

Several thousand fishermen are engaged in catching salmon fish with which to supply the canneries operated by the plaintiffs. A considerable number of these fishermen are employees of the plaintiffs, while the remaining fishermen, although not employees of the plaintiffs, fish for the purpose of selling their catches to the plaintiffs. Many millions of dollars have been invested by the plaintiffs in canneries and in boats, nets, and other fishing gear, "for the purpose of catching, packing, freezing, canning, and preserving salmon fish"; and the complaining corporations enjoy "a large and lucrative business resulting from the sale, freezing, packing, and canning of such salmon fish."

The amended complaint gives an account of the fish legislation enacted in the States of Oregon and Washington in the years 1915, 1917, and 1919. Among the measures enacted by the Oregon legislative assembly is Chapter 367, Laws of 1919; and Section 5 of that enactment is the storm center of this litigation. Section 5 of Chapter 367, Laws of 1919, reads as follows:

"It shall be unlawful for any person to purchase, or offer for sale, any food fish of any variety unlawfully taken from any of the waters of this state, or from any of the waters over which the State of Oregon has concurrent jurisdiction, or to have in their possession or to purchase or offer for sale, any salmon fish of any variety taken beyond the three mile line outside of the Columbia River between the following dates, which are closed seasons in the waters of the Columbia River within the State of Oregon, and over which the State of Oregon has concurrent jurisdiction, to wit: Between 12 o'clock, noon, March 1st, and 12 o'clock, noon, May 1st, and between

12 o'clock, noon, August 25th, and 12 o'clock, noon, September 10th, of any year."

The plaintiffs allege that, because of reasons specified by them, Section 5 is ineffective and inoperative; and the plaintiffs further aver that, since Section 5 is inoperative, "these various plaintiffs herein, through fishermen employed for such purpose, have signified their intention, and are about to engage in the catching of salmon fish beyond the three-mile line outside of the Columbia River, and in the purchase from said fishermen for the operation of their canneries at or near the mouth of the Columbia River of salmon fish caught beyond the three-mile line outside of the Columbia River," but that the defendant has threatened to, and unless restrained "will, arrest any and all persons so engaged in catching such salmon fish beyond the three-mile line outside of said Columbia River, and these plaintiffs, in the event these plaintiffs should purchase of such fishermen for the operation of their canneries at or near the mouth of the Columbia River, any salmon fish caught beyond the three-mile line outside of said Columbia River, which said arrests would greatly harass and embarrass these various plaintiffs in the operation of their respective canneries at or near the mouth of the Columbia River, and would prevent these plaintiffs from at all operating their said respective canneries at or near the mouth of the Columbia River, resulting in great financial loss to these plaintiffs, the exact amount of which it would be impossible to estimate." The amended complaint concludes with a prayer for a decree, restraining the defendant from attempting to enforce Section 5 of Chapter 367, Laws of 1919.

The trial court sustained a demurrer to the amended complaint, and, upon the refusal of the plaintiffs to plead further, a decree was entered, dismissing the amended complaint and the suit. The plaintiffs appealed.

Subsequent to the rendition of the decree in the Circuit Court, the legislative assembly abolished the office of game warden and master fish warden, and the duties, so far as they are material here, which had been exercised by that officer, were transferred to and imposed upon a fish commission provided for by Chapter 1, Laws Sp. Sess., 1920. Chris Schmidt, Frank M. Warren, and Charles Hall were selected and qualified as members of the fish commission, and for that reason the litigants stipulated that the commissioners should be substituted as defendants.

AFFIRMED.

For appellants there was a brief over the name of *Messrs. Norblad & Hesse*, with an oral argument by *Mr. A. W. Norblad*.

For respondent there was a brief over the names of *Mr. George M. Brown*, Attorney General, *Mr. J. O. Bailey*, Assistant Attorney General, and *Mr. J. J. Barrett*, District Attorney, with an oral argument by *Mr. Bailey*.

HARRIS, J.—The questions to be decided can be better considered and discussed if we first give an account of the fish legislation, affecting the Columbia River, enacted in the States of Oregon and Washington in the years 1915, 1917, and 1919. In 1915, conference committees were appointed by the legislative assemblies of the two states, with the view of agreeing upon fish legislation concerning the Columbia River

and other waters. The conference committees met and discussed proposed legislation, and as a result the legislative assembly of Oregon passed a "new Fish Code" providing for the regulation of the taking of salmon from the waters of the Columbia River, over which the States of Oregon and Washington have concurrent jurisdiction, and from other waters within the boundaries of the State of Oregon. This "new Fish Code" is also known as Chapter 188, Laws of 1915; and Section 20, the material section here of the chapter, reads as follows:

"Should Congress, by virtue of the authority vested in it under Section 10, Article One of the Constitution of the United States, providing for compacts and agreements between states, ratify the recommendations of the conference committees of the States of Oregon and Washington, appointed to agree on legislation necessary for the regulation, preservation and protection of fish in the waters of the Columbia River, over which said states have concurrent jurisdiction, and other waters within either state, which would be affected by said concurrent interest, recommendation being as follows:

"We further recommend that a resolution be passed by the legislatures of Washington and Oregon, whereby the ratification by Congress of the laws of the States of Oregon and Washington shall act as a treaty between said states, subject to modification only by joint agreement by said states'; and said recommendation having been approved by resolution adopting the report of the conference committee, then, and in that event, there shall exist between the States of Oregon and Washington a definite compact and agreement, the purport of which shall be substantially as follows:

"All laws and regulations now existing, or which may be necessary for regulating, protecting or preserving fish in the waters of the Columbia River, over which the States of Oregon and Washington

have concurrent jurisdiction, or any other waters within either of said states, which would affect said concurrent jurisdiction, shall be made, changed, altered and amended in whole or in part, only with the mutual consent and approbation of both states."

In 1915, the legislative assembly of Washington enacted a "Fisheries Code." This Code appears as Chapter 31, Laws of Washington 1915. Section 116, the material section here, is as follows:

"Should Congress, by virtue of the authority vested in it under Section 10, Article I, of the Constitution of the United States, providing for compacts and agreements between states, ratify the recommendations of the conference committees of the States of Washington and Oregon, appointed to agree on legislation necessary for the regulation, preservation and protection of fish in the waters of the Columbia River, or its tributaries, over which said states have concurrent jurisdiction, or which would be affected by said concurrent jurisdiction, said recommendation being as follows: 'We further recommend that a resolution be passed by the legislatures of Washington and Oregon, whereby the ratification by Congress of the laws of the States of Washington and Oregon shall act as a treaty between said states, subject to modification only by joint agreement by said states'; and said recommendation having been approved by resolution adopting the report of the conference committee, then, and in that event, there shall exist between the States of Washington and Oregon a definite compact and agreement, the purport of which shall be substantially as follows:

"All laws and regulations now existing or which may be necessary for regulating, protecting or preserving fish in the waters of the Columbia River, or its tributaries, over which the States of Washington and Oregon have concurrent jurisdiction, or which would be affected by said concurrent jurisdiction, shall be made, changed, altered and amended in whole or

in part, only with the mutual consent and approbation of both states."

The legislative assembly of each state adopted a resolution in 1915 requesting Congress to consent to and ratify the agreement made by Oregon and Washington, so as to comply with the requirements of Article I, Section 10, of the Constitution of the United States: S. C. R. No. 5, Laws of Oregon 1915, p. 618. Congress having failed to act upon the resolution submitted in 1915, the legislative assemblies of the two states in 1917 again adopted resolutions, requesting Congress to give its consent to the agreement made by the two states in 1915. Congress finally heeded the request by passing the act of April 8, 1918, consenting to the agreement: 40 Stat. 515. The act of Congress is as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Congress of the United States of America hereby consents to and ratifies the compact and agreement entered into between the States of Oregon and Washington relative to regulating, protecting, and preserving fish in the boundary waters of the Columbia River and other waters, which compact and agreement is contained in section twenty of chapter one hundred and eighty-eight of the General Laws of Oregon for nineteen hundred and fifteen, and section one hundred and sixteen, chapter thirty-one, of the Session Laws of Washington for nineteen hundred and fifteen, and is as follows:

"All laws and regulations now existing, or which may be necessary for regulating, protecting, or preserving fish in the waters of the Columbia River, over which the States of Oregon and Washington have concurrent jurisdiction, or any other waters within either of said States, which would affect said concurrent jurisdiction, shall be made, changed, altered,

and amended in whole or in part, only with the mutual consent and approbation of both States.'

"Nothing herein contained shall be construed to affect the right of the United States to regulate commerce, or the jurisdiction of the United States over navigable waters."

By the terms of Section 18, Chapter 188, Laws of Oregon 1915, it was made unlawful for any person to purchase any food fish unlawfully taken from any of the waters of this state, or from any of the waters over which the State of Oregon had concurrent jurisdiction during any closed season prescribed by law. In 1917, Section 18 of Chapter 188, Laws of Oregon 1915, was amended so as to read as follows:

"It shall be unlawful for any person to purchase, or offer for sale, any food fish of any variety unlawfully taken from any of the waters of this state, or from any of the waters over which the State of Oregon has concurrent jurisdiction, or to have in their possession or to purchase or offer for sale, any salmon fish of any variety taken beyond the three-mile line outside of the Columbia River, during any closed season prescribed by law; and any person who purchases or offers for sale any such fish, during any such period, shall be guilty of a violation of this act": Section 3, Chapter 219, Laws 1917.

By the terms of Section 65, Chapter 31, Laws of Washington 1915, it was unlawful to purchase any food fish unlawfully taken from the waters of Washington during any of the closed seasons prescribed by that act. In 1917 the legislative assembly of Washington amended Section 65 of Chapter 31, Laws of 1915, so as to make it read as follows:

"It shall be unlawful for any person, firm or corporation to purchase, handle, deal in or have in his possession except for the sole use of himself and family any food fish of any variety which were taken from the waters of this state during any of the closed

seasons prescribed in this act, and any person who purchases, handles, deals in or has in his possession any such fish during such periods, except for the sole use of himself and family, shall be guilty of a misdemeanor. And it shall be unlawful for any person, firm, or corporation to purchase, handle, deal in, or have in his possession, except for the sole use of himself and family any salmon fish of any variety which were taken beyond the three mile limit outside of the Columbia River, during any of the closed seasons prescribed in this act: *Provided, however*, That this provision shall not apply to salmon taken beyond the three mile limit outside the Straits of Juan de Fuca": Section 16, Chapter 169, Laws of Washington 1917.

On November 20, 1918, Section 16 of Chapter 169, Laws of Washington 1917, was held to be unconstitutional by the Supreme Court of Washington: *State v. Belknap*, 104 Wash. 227 (176 Pac. 5, 182 Pac. 570).

In 1919, the legislative assembly of Washington did not enact any statute which is any wise material here; but in Oregon the legislature, which convened in that year, enacted Chapter 367. In addition to Section 5, already quoted, there is another material section to be found in Chapter 367, Laws of Oregon 1919, for Section 10 of that act expressly repeals Section 18 of Chapter 188, Laws of Oregon 1915, as amended by Section 3 of Chapter 219, Laws of Oregon 1917.

The plaintiffs say that Section 5 of Chapter 367, Laws of Oregon 1919, is ineffective because: (1) It is not a valid exercise of the police power of the state; (2) it is discriminatory and not general in its operation, and is therefore violative of Article I, Section 20, of the state Constitution and of Article XIV, Section 1, of the federal Constitution; (3) it infringes upon the foreign and interstate commerce clause of Article I, Section 8, of the federal Constitution; and

(4) it impairs the obligations of the contract embodied in the compact between Oregon and Washington, and hence is violative of Article I, Section 10, of the Constitution of the United States, and of Article I, Section 21, of the state Constitution.

The litigants do not agree upon the construction to be placed on the words "beyond the three-mile line outside of the Columbia River" found in Section 5, Chapter 367, Laws of 1919. The defendant argues that the quoted language means "the space where fishermen are accustomed to fish for salmon, using landing places along the Columbia River or at the mouth of the river as their base." The plaintiffs interpret the language of Section 5 of the statute to cover that space which is west of the three-mile line and between the north and south boundary lines of the Columbia River projected west from and beyond the three-mile line. The construction given by the plaintiffs does not confine the operation of the statute to such narrow limits as to make it absurd and unreasonable or as to defeat the purpose of the enactment, for when we are told that it is seven miles from the south headland to the north headland at the mouth of the river, we at once understand that the statute refers to a large area. The words "beyond the three-mile line," when considered as standing alone, are broad, comprehensive, and unlimited; for any point, whether off the Oregon or the Washington or the California or the British Columbia or the Alaskan coast, would be beyond the three-mile line, if more than three miles from the shore; and hence, when we find the unrestricted words "beyond the three-mile line," immediately followed by the words "outside of the Columbia River," we at once know that the latter words are words of limitation, because

otherwise they would be utterly inoperative and useless.

1-3. One of the accepted rules of statutory construction requires courts to so construe a statute as to give effect to every clause, if possible: *Henry v. Yamhill Co.*, 37 Or. 562, 564 (62 Pac. 375); *In re Willow Creek*, 74 Or. 592, 614 (144 Pac. 505, 146 Pac. 475); 25 R. C. L. 1004. In construing a statute, ascertainment of the intention of the legislature is the "consummation devoutly to be wished"; and, if the words of the statute are not of themselves sufficiently explicit to manifest the intention of the law-makers, the intention is then to be ascertained by considering the context, the subject matter, the necessity for the law, and the circumstances under which it was enacted, the mischief sought to be remedied, and the object to be attained; 25 R. C. L. 1012; 36 Cyc. 110. If, however, the intention of the legislature cannot be discovered, the court should give the statute a reasonable construction consistent with the general principles of law: 36 Cyc. 1108.

The Columbia River salmon has acquired a world-wide reputation for excellence as a food fish. The business of catching, canning, and packing salmon has developed into one of the leading industries of this commonwealth, and the value of the annual pack amounts to millions of dollars. Although there are canneries located on the Rogue, the Umpqua, and the Siletz Rivers, and other coastal streams in this state, the major portion of the annual salmon pack comes from the Columbia River. The habits of salmon are such that when they "run" from the sea to fresh water for spawning purposes most of them "run" to the waters where they themselves were propagated; and hence, most of the salmon which have been propa-

gated in the Columbia River and its tributaries, when they "run" from the sea, enter the Columbia River, and not some other stream emptying into the sea. In order to protect and preserve this food fish, which furnishes the basis of one of the state's largest industries, it has been found necessary to close the waters of the Columbia to fishermen during certain periods. The closed season for a given stream is fixed with reference to the habits of the salmon which each year are expected to "run" up that stream. Experience and observation have shown that the salmon, before beginning to "run" up the Columbia River, congregate in large numbers off the mouth of the river, and the "run" of salmon up the river continues for a considerable period. The closed season is so timed and fixed as to enable a portion of the "run" to ascend the river without molestation and thus furnish the necessary supply for both natural and artificial propagation. There are, of course, closed seasons prescribed for each of the Oregon coastal streams in which salmon are found. However, the closed season for a given stream is fixed with reference to the habits of salmon found in that stream, and not with reference to the habits of salmon running up other streams, because the annual "run" in one stream does not coincide in point of time with the "run" in another stream; and the necessary result is that during a given period the Columbia may be open and at the same time one or several of the other coastal streams may be closed to fishermen; or, on the other hand, the Columbia may be closed while one or several of the other streams may be open to fishermen. It is apparent that, because of these differences in the closed seasons prescribed for the different streams, the legislature,

when framing and enacting Section 5 of Chapter 367, was legislating with reference to the conditions found in the Columbia River. For example, during a portion of the time when the waters of the Columbia are closed, the season is open on the Siuslaw River. Now, it is manifest that the legislature did not intend to say that fish caught off the Siuslaw River and beyond the three-mile line at a time when the season was open on the Siuslaw, but closed on the Columbia, could not be brought into this state and possessed here.

4. The word "outside" is formed by combining two words, "out" and "side"; and, among other definitions the combined word is defined thus: "Outside of, on or to the exterior of; without; outward from"; Cent. Dict. If a line be projected west from the north headland of the Columbia River and another line be similarly projected from the south headland to and across the three-mile line and if that part of the three-mile line which is between the two projected lines is taken as the side of the Columbia River, then the word "outside," when given a natural and not an artificial or strained signification, means the waters on the exterior of such side. The construction placed upon the statute by the plaintiffs, not only gives to the word "outside" a natural meaning, but it possesses the additional merit of being definite and certain. Moreover, this construction of the statute does not lead to absurd results; but, on the other hand, it enables the state, through its proper officers, to effectuate the purposes of the statute by dealing with conditions as they actually exist.

5. When the state through its legislature enacted the statute now in controversy, it did so upon the assumption that the enactment was an exercise of the

police power. Because of the wide range over which this power may be exercised, it is difficult, if not impossible, to mark out in advance the exact limits of its reach; and therefore it cannot be accurately defined although it may be understandingly described. A concise statement, which emphasizes the thought that the field within which the police power may be exerted is very broad, is found in *State v. Redmon*, 134 Wis. 89, 105 (114 N. W. 137, 126 Am. St. Rep. 1003, 15 Ann. Cas. 408, 14 L. R. A. (N. S.) 229), where it is said:

"It is the power to make all laws which in contemplation of the Constitution promote the public welfare."

The police power embraces the whole sum of inherent sovereign power which the state possesses, and, within constitutional limitations, may exercise for the promotion of the order, safety, health, morals, and general welfare of society: 12 C. J. 904; *Stettler v. O'Hara*, 69 Or. 519, 531 (139 Pac. 743, Ann. Cas. 1916A, 217, L. R. A. 1917C, 944); *Mill Creek Coal & Coke Co. v. Public Service Commission* (W. Va.), 100 S. E. 557 (7 A. L. R. 1081).

6. The preservation of fish and game has always been treated as being within the proper domain of the police power; and, consequently, when the law-makers passed the act of 1919, they legislated concerning a subject which is clearly within the embrace of the police power: *Lawton v. Steele*, 152 U. S. 133 (38 L. Ed. 385, 14 Sup. Ct. Rep. 449); *Geer v. Connecticut*, 161 U. S. 519 (40 L. Ed. 793, 16 Sup. Ct. Rep. 600); *Silz v. Hesterberg*, 211 U. S. 31 (53 L. Ed. 75, 129 Sup. Ct. Rep. 10); *State v. Schuman*, 36 Or. 16, 25 (58 Pac. 661, 78 Am. St. Rep. 754, 47 L. R. A. 153).

7-9. The legislature, it is true, is not the final judge of the limitations of the police power, and, since the legislative action must be reasonably necessary for the public benefit, the validity of all police regulations depends upon whether they can ultimately pass the judicial test of reasonableness; and yet, it is also true that it is the legislative function primarily to determine the necessity or expediency of measures adopted. When, however, the courts are called upon to apply the judicial test of reasonableness, they will accord to the legislature a large discretion in determining, not only what the interests of the public require, but also what measures are necessary for the protection of such interests: *Lawton v. Steele*, 152 U. S. 133 (38 L. Ed. 385, 13 Sup. Ct. Rep. 499); *Silz v. Hesterberg*, 211 U. S. 31 (53 L. Ed. 75, 29 Sup. Ct. Rep. 10); *Ex parte Mon Luck*, 29 Or. 421, 426 (44 Pac. 693, 54 Am. St. Rep. 804, 32 L. R. A. 738); *Lorntsen v. Union Fisherman's Co.*, 71 Or. 540, 547 (143 Pac. 621); *State v. Redmon*, 134 Wis. 89 (114 N. W. 137, 126 Am. St. Rep. 1003, 15 Ann. Cas. 409, 14 L. R. A. (N. S.) 229); 12 C. J. 933. Moreover, when applying the test of judicial reasonableness, the presumption is in favor of the reasonableness and validity of the regulation: 12 C. J. 934.

10. The plaintiffs insist that Section 5 of the statute is an unreasonable police regulation, because it is unusual, fails to accomplish its avowed purpose, and is unduly oppressive upon individuals "and the financial resources of the great fishing industry." That Section 5 is unusual may be conceded; but it must also be conceded that the conditions attempted to be met are unusual. It is not unusual to find statutes prescribing closed seasons; nor is it unusual to find the law so framed as to make it unlawful to sell, pur-

chase, or possess game or fish during the closed season, even if originally taken and brought from without the state which enacted the law. As already pointed out, the salmon "runs" do not occur in all the streams at the same time, and consequently it is impracticable to prescribe the same closed season for all the streams. When legislation is enacted for the protection of fish in the Columbia it must, in order to accomplish its purpose, be framed with reference to conditions found to exist in the waters of that river, and it is manifest that Section 5 was in fact framed with reference to the conditions existing there; and hence, the provisions of Section 5 are unusual only to the extent that the conditions which called for the adoption of the measure were and are unusual.

11. Of course the State of Oregon has no jurisdiction over the waters of the Pacific Ocean beyond the three-mile line; nor did the state by the enactment of the statute in question attempt to make fishing beyond the three-mile limit unlawful. The statute was adopted in order to make effective the prohibition against taking fish during the closed season from waters over which the state may rightfully exercise jurisdiction, and that the state has authority to do this is settled beyond controversy: *Silz v. Hesterberg*, 211 U. S. 31 (53 L. Ed. 75, 29 Sup. Ct. Rep. 10, see, also, Rose's U. S. Notes).

12. Since there is no statute like Section 5 in force in the State of Washington, canneries operated on the Washington side of the Columbia River can, without hindrance, purchase and pack, during the closed season, salmon caught beyond the three-mile line outside of the Columbia River, with the result that Washington canneries are permitted, during the

closed season, to pack the same fish which the Oregon canneries are prohibited from packing during that time. The conditions permitted to exist on the Washington side of the river do not defeat the object sought to be accomplished by the Oregon statute, although they do interfere with and probably prevent the full and complete attainment of the object sought to be accomplished by the Oregon statute. Absence of like legislation in the State of Washington affects only the degree of protection, but it does not entirely prevent protection. It may be true that the Columbia River salmon would be better protected if the State of Washington had enacted and now enforced legislation like Section 5 of our statute; and, indeed, if we correctly understood the argument of counsel for the plaintiffs at the hearing, the plaintiffs themselves say that they would be pleased to see British Columbia and the States of Washington, Oregon, and California pass legislation similar to Section 5, because such legislation, if in force in British Columbia and in the three named states, would undoubtedly be helpful in preserving and protecting salmon as a food fish. The contention of the plaintiffs that Section 5 is an unreasonable exercise of the police power cannot be sustained.

13. The argument that Section 5 is discriminatory and not general in its application, and therefore unconstitutional, is answered adversely to the position taken by the plaintiffs in the opinions rendered in *State v. Savage*, 96 Or. 53 (184 Pac. 567, 189 Pac. 427), and *State v. Blanchard*, 96 Or. 79 (189 Pac. 421). See, also, 11 R. C. L. 1045.

14. The holding in *Silz v. Hesterberg*, 211 U. S. 31 (53 L. Ed. 75, 29 Sup. Ct. Rep. 10, see, also, Rose's U. S. Notes), is authority for the conclusion that

Section 5 of our statute does not contravene the foreign and interstate commerce clause of the federal Constitution: See, also, *State v. Schuman*, 36 Or. 16 (58 Pac. 661, 78 Am. St. Rep. 754, 47 L. R. A. 153); *Ex parte Maier*, 103 Cal. 476 (37 Pac. 402, 42 Am. St. Rep. 129); *Ex parte Fritz*, 86 Miss. 210 (38 South. 722, 109 Am. St. Rep. 700); 5 R. C. L. 762.

The next contention urged by the plaintiffs is that the compact between the States of Washington and Oregon is a contract, and that it is therefore protected by the state and federal Constitutions against legislation impairing its obligations: *Green v. Biddle*, 8 Wheat. 1 (5 L. Ed. 547); *Poole v. Fleeger*, 11 Pet. 185 (9 L. Ed. 680); *Virginia v. Tennessee*, 148 U. S. 503 (37 L. Ed. 537, 12 Sup. Ct. Rep. 728); *Wharton v. Wise*, 153 U. S. 155 (38 L. Ed. 669, 14 Sup. Ct. Rep. 783, see, also, Rose's U. S. Notes).

15. For the purposes of the instant case we shall assume, without attempting to decide, that the compact entered into between Oregon and Washington is binding upon both parties to the extent that one cannot withdraw without the consent of the other, and that therefore one state cannot, without the "consent and approbation" of the other state, enact any law which would conflict with the terms of the compact. Again directing attention to the compact, we observe that the two states have expressly limited their agreement to laws and regulations "which would affect said concurrent jurisdiction." As ruled by the United States Circuit Court of Appeals for the Ninth Circuit, in *Olin v. Kitzmiller*, 268 Fed. 348, recently decided: "It is only as to its common right with the adjoining state to take fish from those waters that its right is limited by the compact." This state has not attempted to change the closed season. The prohibi-

tion of the Oregon statute is operative only during the periods which both states have fixed as the closed seasons on the Columbia. The inhibition of Section 5 merely aids in keeping such seasons closed. Section 5 does not "affect" the "concurrent jurisdiction" of the two states, and, indeed, it recognizes, rather than ignores, the jurisdiction which the two states have concurrently exercised.

Our conclusion is that the ruling made by the Circuit Court was correct; and hence the decree appealed from is affirmed.

AFFIRMED.

McBRIDE, C. J., and BURNETT and JOHNS, JJ., concur.

Denied January 25, 1921.

ON PETITION FOR REHEARING.

(194 Pac. 854.)

On petition for rehearing.

DENIED.

Messrs. Norblad & Hesse, for the petition.

Mr. J. J. Barrett, District Attorney, *Mr. George M. Brown*, Attorney General, and *Mr. J. O. Bailey*, Assistant Attorney General, *contra*.

McBRIDE, J.—We have carefully considered the able brief of counsel for the plaintiffs filed with the petition for a rehearing. While the arguments therein restate forcibly and vividly the objections to the act of 1919, they fail to convince us that such act is unconstitutional or in any respect affected by the compact between the States of Oregon and Washington relating to the protection of salmon in the waters

over which the states have concurrent jurisdiction. That the usefulness of the act as a protective measure is largely impaired by the failure of the State of Washington to enact similar legislation is patent. That the use of purse seines and like appliances at the mouth of the Columbia River by Washington fishermen will eventually greatly impair, if not destroy, the value of the Columbia River as a producer of salmon, is plain to everyone familiar with the subject. That our present law operates harshly upon Oregon fishermen and canneries cannot be disputed. But these are considerations that properly address themselves to the legislatures of the two states, and not to the courts. The fact remains that Oregon has done its part to protect an industry which is a source of millions of dollars of profit to the citizens of both states, while Washington, with an equal interest in such protection, has failed so far to act effectively in the matter.

Perhaps as a matter of even-handed justice the present law should be repealed, and Oregon canneries be allowed to participate in the spoliation of the salmon industry on the Columbia River equally with the canneries on the Washington side of the river, but this court cannot effect such repeal by declaring the law unconstitutional. The legislatures of both states are now in session, and it is unthinkable that they will sit idly by without mutually devising a remedy for conditions which threaten to destroy a great industry.

The petition for rehearing is denied.

AFFIRMED. REHEARING DENIED.

BURNETT, C. J., and JOHNS and HARRIS, JJ., concur.

Argued January 5, reversed and remanded January 25, 1921.

STATE v. STEIDEL.

(194 Pac. 854.)

Jury — Opinion from Reading Newspapers not Necessarily a Disqualification.

1. Whether an opinion has been formed from reading the newspapers which it will take evidence to remove is not a conclusive test of the qualification of a juror, the test under Section 123, Or. L., being whether he is in such a frame of mind as to enter on the trial prepared to form an impartial judgment from what he hears on the trial.

Criminal Law—Ruling That Foundation for Impeachment of Witness was Insufficient Held Harmless.

2. Ruling as to insufficiency of foundation for impeachment, if error, was harmless, where the testimony sought to be impeached related to an immaterial matter.

Witnesses—Impeachment Only as to Material Matters.

3. A witness can only be impeached on matters that are material to the issues.

Assault and Battery—Identity of Policeman to Whom Defendant Gave Pistol Previously Taken from a Policeman Held Immaterial.

4. In prosecution for assault and battery committed by defendant in taking pistol from policeman during policeman's fight with fugitive, testimony as to whether defendant gave pistol to such policeman on command of another policeman, or gave it directly to such other policeman, *held* immaterial.

Criminal Law—Witnesses—Cross-examination of Defendant not Reversible Error in View of Defendant's Direct Testimony.

5. Where defendant charged with assault and battery testified on direct examination that he was a landscape gardener by occupation, cross-examination as to how much of his time was devoted to work as secretary of the Labor Socialist party, *held* not ground for reversal, being proper cross-examination of defendant's direct testimony as to his occupation was proper, and being invited error, of which he cannot complain on appeal, if such direct testimony was improper.

Assault and Battery—Defendant Held Entitled to Submission of Self-defense Issue in View of Evidence.

6. In prosecution for assault and battery in taking pistol from a police officer during officer's fight with person being arrested, where there was evidence which would have warranted jury in finding that defendant did not know that one of men was a police officer, that during the rough-and-tumble fight the pistol had been discharged three or four times, that defendant honestly believed that

he was in danger of death or great bodily harm by the careless discharge of the pistol, the defendant was entitled to instructions submitting issue of self-defense, since, if defendant believed himself or others in danger of bodily harm, he had a right to take pistol, under Sections 1806 and 1898, Or. L.

Assault and Battery—Defendant may Prove Self-defense Under Plea of not Guilty.

7. In view of Section 1500, Or. L., defendant accused of assault and battery is not required to enter a plea of self-defense, but is entitled to prove self-defense under the plea of not guilty.

From Clatsop: JAMES A. EAKIN, Judge.

Department 1.

The defendant was indicted and convicted on a charge of assault and battery, and has appealed.

REVERSED AND REMANDED.

For appellant there was a brief over the name of *Messrs. Mathison & Mannix*, with an oral argument by *Mr. Joseph Mannix*.

For the State there was a brief over the names of *Mr. Miller E. McGilchrist*, Special Assistant Attorney General, and *Mr. Jasper J. Barrett*, District Attorney, with an oral argument by *Mr. McGilchrist*.

BURNETT, C. J.—The theory of the state is that a policeman of Astoria, Holder by name, was engaged in the arrest of a man named Swanson and pursued him into the front room of an establishment maintaining a cigar-store in the front room and pool-tables in the back room; and that Swanson resisted, and, while he and the officer were engaged in a struggle over a pistol which the policeman had drawn and had discharged three or four times, the defendant came in from the back room and interfered in the struggle, wrested the pistol from Holder, and beat him over the head with it. The theory of the defend-

ant is that he heard the shots, and, going into the front room, found two men engaged in a fight over a pistol; and that, not knowing Holder was an officer and believing there was great danger from the reckless manner in which it was being handled, the pistol would be discharged and wound either him or the bystanders, he rushed in and jerked it from the grasp of Holder, without using any more force than was necessary to secure the weapon.

1. The defendant assigns as error the action of the court in permitting two jurors to serve at the trial who stated that they had read an account of the affray in the newspapers and had formed therefrom an opinion which it would require evidence to remove. It appears from the bill of exceptions that the defendant had exhausted all of his peremptory challenges when one at least of the two jurors was called. One of them, having declared that all of the evidence he had was from reading the papers, said it would not give one side an advantage over the other. The other stated in response to questions by the court that he would lay aside the opinion derived from reading the newspapers and try the case as if he had never formed an opinion in regard to it. Having formed an opinion from reading the newspapers, which it would take evidence to remove, is not a conclusive test of the qualification of a juror. Any man of ordinary intelligence will acquire some opinion respecting any transaction related to him, and, not expecting to have any further connection with the matter, that state of his mind may be satisfactory to him until he hears something different. The question to be determined by the court is, not whether the juror is ignorant of the matter, but whether he is in such a frame of mind as to enter upon the trial prepared to

form an impartial judgment from what he hears on the trial. Section 123, Or. L., reads thus:

“A challenge for actual bias may be taken for the cause mentioned in the second subdivision of Section 121; but on the trial of such challenge, although it should appear that the juror challenged has formed or expressed an opinion upon the merits of the cause from what he may have heard or read, such opinion shall not of itself be sufficient to sustain the challenge, but the court must be satisfied, from all the circumstances, that the juror cannot disregard such opinion and try the case impartially.”

Among the latest decisions of this court on this subject is that in *State v. Humphrey*, 63 Or. 540 (128 Pac. 824), where the authorities are collated, and it is held, on substantially the same showing as in the present case, that no error was committed in overruling the challenge to the jurors.

2-4. It appears in testimony that, about the time the defendant took the pistol from Holder, another policeman appeared and, drawing his own pistol, compelled the defendant to surrender the one taken from Holder; whereupon the second policeman, Turner by name, arrested the defendant and took him to the police station. In cross-examining Turner, defendant's counsel questioned the witness about who took the pistol from Steidel. The witness said:

“He held it out in his hand, and I took it when he held it out, when the officer—

“Q. That is, you took it away from him?

“A. No. I didn't.”

Then he testified that Steidel handed the gun to Holder and later on said, “I guess so, he might have laid it down.” He further stated that he himself never had the gun until he got close to the police station. Further, on cross-examination, after Turner

had admitted meeting a blacksmith named Swenson at the station when Steidel was taken there, defendant's counsel asked him this question: "Didn't you tell him at that time and place, that, when you came in there, Steidel had given you the gun?" The witness answered: "No, sir; I told him nothing about the case." Having called Swenson for the purpose of impeaching Turner, the court held that the foundation for the impeachment of Turner had not been sufficiently laid, and refused to allow Swenson to testify. If this be error, it is immaterial. A witness can only be impeached on matters that are material to the issues. The evidence disclosed by the bill of exceptions is plain, to the effect that the defendant gave up the pistol at the command of officer Turner. Whether he surrendered it directly to Turner or to Holder, who was standing there, is utterly immaterial. There is no assignable error on this point.

5. During his examination in chief, in response to questions by his counsel the defendant testified that he was by occupation a landscape gardener. On cross-examination he was first asked how much time he had devoted to distributing radical and revolutionary literature during the last year or so, and how much time he had been giving the Socialist party as its secretary. The court sustained the objections of defendant's counsel to these questions, but permitted the witness to answer this question: "Since you have been in Astoria have you, or have you not, been occupied at least part of that time with the Socialist or so-called Labor Socialist party?" The witness answered: "No, sir; I know—" At this point his counsel interposed an objection, which was overruled, and the defendant then answered:

"The party I belong to is known as the Socialist Labor party. They are not occupying anybody—the work is done voluntary and they are not paying anything, and I was at one time secretary of that organization."

Over his counsel's objections he was asked, "Do you have charge of the reading-room down here on Ninth Street?" and he answered, "I have not got no charge, no more there than any other man belongs to that organization." It is, of course, true that at law the defendant was neither to be praised nor punished for his political opinions or for his connection with any political party. Nor does the fact of his being a landscape gardener condemn or exonerate him in the trial of the issue upon the indictment. His occupation, however, was injected into the case by his own counsel, evidently for the purpose of creating a favorable impression with the jury. He cannot complain, therefore, if he is cross-examined upon the same subject with a view of replacing that impression with an unfavorable one. He might have answered the interrogatories mentioned by a simple affirmative or negative, as the truth might be. It was his own fault in descanting upon his connection with his party. Granting that it was proper for the defendant to inform the jury that he was a landscape gardener, the cross-examination was germane and hence admissible. Otherwise this matter constitutes invited error, profiting the defendant nothing on appeal.

In several forms the defendant made timely requests of the court to instruct the jury on the doctrine of self-defense in his behalf. In substance, without repeating all of them in detail, he requested the court to charge the jury that although Holder was a police officer, yet if this fact was unknown to the defendant

without the fault of the latter, and Holder was firing a loaded revolver in such a reckless manner as might inflict upon the defendant great bodily injury, the defendant, if he believed it necessary for his own protection or to prevent great bodily injury to himself or others, acted as a reasonably prudent man and struck Holder with the pistol through a mistake of fact, without defendant's fault, as to Holder's position, it would be an act of the defendant in self-defense, and the duty of the jury would be to find him not guilty. All of the requested instructions on self-defense were refused. On the contrary, the court said to the jury:

"The defendant has not pleaded self-defense in this case. There is no claim on his part that he was acting in self-defense. The only claim is that he was acting in the character of a peacemaker to stop the fight which he claims he supposed was between two frequenters of the establishment and that he did nothing more than was necessary to take the gun from the parties and prevent them from further use of it."

6. In Section 1806, Or. L., it is said that:

"Resistance to the commission of a crime may be lawfully made by the party about to be injured or by any other person in his aid or defense—to prevent a crime against his person. * * "

As against the commission of a crime one may defend not only himself, but others as well, under the authority of this section. Section 1898, Or. L., is in these words:

"If any person shall, in the commission of an unlawful act, or a lawful act without due caution or circumspection, involuntarily kill another, such person shall be deemed guilty of manslaughter."

As indicated above, the defendant was in a place of public resort where he had a right to be. Presented before him was a rough-and-tumble fight between two

men over a pistol which had been discharged three or four times. He was ignorant that one of them was an officer endeavoring to make an arrest. If he honestly believed from these circumstances, as he saw them, that he was in danger of death or great bodily harm by the careless discharge of the pistol, and acted as a reasonable man would in his situation, he would have a right to take such steps as were fairly necessary to avert the impending danger. We do not say that these are the facts. We do say, however, that there is evidence in the record which would authorize the jury to find such to be the facts. Under these circumstances, the defendant is entitled to instructions covering his theory of the case.

Self-defense is not necessarily based upon actual combat between the defendant and the individual producing the situation of danger which he would quell. Nor is it requisite to show that the one creating the situation of danger had an intention thereby to commit a crime. A toddling child, incapable of forming a criminal intent, might make it very dangerous for a bystander, if armed with a loaded pistol. It would be unreasonable to say that the bystander could not act in self-defense and disarm the child. So, in the present juncture, if the policeman, not known as such to the defendant, was recklessly firing his pistol, under conditions outlined in Section 1898, Or. L., *supra*, the defendant would have a right to take reasonable means to avert the danger to himself or the other bystanders in like peril.

7. It is not necessary to enter a plea of self-defense. There are but three kinds of pleas to an indictment, namely:

“(1) Guilty; (2) not guilty; (3) a former judgment of conviction or acquittal of the crime charged,

which may be pleaded either with or without the plea of not guilty": Section 1500, Or. L.

Under the plea of not guilty, the defendant is entitled to prove self-defense. And if there was any evidence on that subject he was entitled to proper instructions on that branch of the law.

For this reason the judgment must be reversed, and the cause remanded for proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

McBRIDE, BEAN and HARRIS, JJ., concur.



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APPEAL AND ERROR.

Appeal and Error—Defect in Complaint Waived, Where not Challenged Below by Demurrer.

1. Though the complaint for reformation of a policy of burglar insurance was defective in failing to allege that the mistake was mutual, etc., yet where it was not challenged by demurrer, it cannot, after decree, be attacked in the appellate court, and the defective statement will there be treated as sufficient. (Rosenberg Suit & Coat Co. v. General Accident Fire Assur. Corp., 118.)

Appeal and Error—Error in Instruction Held Cured by Verdict for Defendant on Separate Independent Issue.

2. In action for possession of sheep, any error in an instruction as to plaintiff's former right of possession as between him and the owner, a third party, was immaterial, where the verdict showed that the jury did not find against plaintiff as having no special property or ownership, but found in favor of defendant on his affirmative answer that he took up the sheep, for trespassing and cared for them. (*La Follet v. Jones*, 136.)

Appeal and Error—Divorce Decree Affirmed Without Prejudice to Another Suit.

3. Where divorce case was tried on short notice to both parties, and it was suggested at the hearing that the plaintiff could, if given more time, secure additional witnesses, a decree denying divorce was affirmed without prejudice to another suit, under Section 411, L. O. L. (*Cox v. Cox*, 148.)

Appeal and Error—Case Before Supreme Court on Complaint and Findings in Absence of Bill of Exceptions.

4. Where there is no bill of exceptions in the record, the case comes to Supreme Court on the complaint and findings. (*Portland v. O'Neill*, 162.)

Appeal and Error—Objection to Jurisdiction may be Raised First on Appeal.

5. An objection that the court had no jurisdiction of the subject matter of the action under the allegations of the complaint may be made for the first time on appeal, under section 72, Or. L. (*Dip-pold v. Cathlamet Timber Co.*, 183.)

Appeal and Error—Appeal Dismissed, and Judgment Affirmed, for Failure to File Abstract.

6. Where appellant asks and obtains 20 days' additional time within which to file her abstract, and fails to file it within several months, a motion for dismissal and affirmance of judgment will be granted, under Rules 6 and 16, 89 Or. 712, 718, (173 Pac. viii, x). (*Rahn v. Gray*, 271.)

Appeal and Error—Unreasonable Delay in Filing Bill of Exceptions No Excuse for Failure to File Abstract.

7. While the Supreme Court has not fixed any precise limit of time within which a bill of exceptions must be settled and filed and sent to it, it will not allow an unreasonable delay in so doing to excuse a failure to file the abstract within the time allowed by the rules or an extension of such time. (*Rahn v. Gray*, 271.)

Appeal and Error—Surety must Appear Before Judge or Clerk to Justify.

8. Under subdivisions 2, 3, Section 550, L. O. L., relating to sureties on the appeal undertaking, and requiring them to justify as a case of bail on arrest, and Section 270, requiring bail to attend before the judge or clerk to justify, an undertaking on appeal is insufficient where the surety, instead of appearing before the

judge or clerk, appeared before a notary public, and was examined on written interrogatories. (Logan v. Cross, 274.)

Appeal and Error—Cognizance not Taken of Oral Stipulations Out of Court.

9. Appellate court cannot take cognizance of oral stipulations made by attorneys outside of court. (Logan v. Cross, 274.)

Appeal and Error—Appellant Permitted to File Additional Undertaking After Dismissal, on Showing of Illness of Counsel.

10. After dismissal of an appeal by reason of failure of surety on appeal undertaking to properly justify before a judge or clerk, appellant was permitted to file an additional undertaking, where it appeared that his attorney was ill and spent some days in the hospital, rendering it impossible for him to attend to his client's affairs. (Logan v. Cross, 274.)

Appeal and Error—Finding of Lower Court Entitled to Weight, Though Case is Tried De Novo.

11. A proceeding on a verified claim against the estate of a deceased, being an equitable one, is under the statute tried *de novo* in the Supreme Court, as well as the Circuit Court on the record made in the County Court, but the fact finding of the county judge is entitled to some weight, as he heard the witnesses. (Johnston v. Apple, 278.)

Appeal and Error—Findings on Conflicting Evidence not Disturbed.

12. If there was any substantial evidence upon which to base the findings and judgment of the trial court, the Supreme Court will affirm the judgment, for it is not within its province to decide a controverted question of fact decided by trial court on conflicting testimony. (Adams v. King, 305.)

Appeal and Error—Transfer of Property Adjudicated to Party Waived Right of Appeal.

13. Where a suit for accounting by landlord against tenant renting on shares the effect of the court's decision was to give tenant credit for property which he purchased and paid for, but which landlord should have purchased, leaving title to the property in landlord, a transfer after oral decision, but before entry of decree by the landlord, of the leased premises, including the property adjudicated to landlord, waived the right to appeal, though it was also decided that the lease continued for several years longer, and the landlord's deed warranted against encumbrances, which warranty, however, was obviated by contemporaneous contract by grantees that tenant's occupancy was to be excluded from the operation of warranty. (Richmond v. White, 310.)

Appeal and Error—Denial of Motion to Elect Held not Reversible Error Under Statute.

14. Even if plaintiff, under Section 67, Or. L., should have stated two alleged causes of action in one count, his failure to do so held not ground for reversal, under Sections 85 and 107, because of denial of defendant's motion to compel election; defendant having

suffered no prejudice by the ruling. (*Johnson v. Homestead-Iron Dykes Mines Co.*, 318.)

Appeal and Error—Under the Constitution, Verdict Supported by Some Evidence not Reviewable.

15. Under Article VII, Section 3, of the Constitution, the Supreme Court will not re-examine a cause or fact tried by a jury, unless the court can affirmatively say there is no evidence to support the verdict. (*Johnson v. Homestead-Iron Dykes Mines Co.*, 318.)

Appeal and Error—Technical Objections Considered from Technical Standpoint.

16. Where objections urged on appeal are very technical and not of a character calculated, if applied, to promote justice, they are to be considered from a technical standpoint. (*Pope v. MacDonald*, 373.)

Appeal and Error—Pleading—Court Properly Permitted Filing of Reply on Trial.

17. Where plaintiff's attorney seasonably prepared a reply denying payment pleaded by defendant, and had it verified, but, not finding defendant's attorney in the city, put it by for future service and overlooked the matter until apprised of it by the opening statement of counsel at the trial, when he promptly asked leave to file it, court properly permitted it to be filed in view of Sections 102, 103, 107, Or. L.; the answer alleging payment and reply simply controverting such allegation, and not changing defense or cause of defense. (*Pope v. MacDonald*, 373.)

Appeal and Error—Jurisdiction cannot be First Challenged on Appeal.

18. In a suit to restrain the maintenance of a road, where the defendants filed no demurrer or other similar plea to the complaint, but alleged that the road was duly established, defendants cannot on appeal challenge the jurisdiction of the court. (*Myers v. Clackamas County*, 391.)

Appeal and Error—Appeal Purely Statutory.

19. An appeal is statutory, and does not exist as a matter of right. (*Smith Security Co. v. Multnomah County*, 418.)

Appeal and Error—No Presumption That Wife Consented to Revelation of Her Privileged Communications.

20. The ruling of the court in an alienation of affections suit in admitting privileged communications of plaintiff's wife cannot be supported on the theory that, there being no affirmative statement in the record showing that she objected to the revelation of her communications, it must be presumed that she consented, where all that was done or said at the trial appears in the record and no such consent appears therein. (*Pugsley v. Smith*, 448.)

Appeal and Error—Transcript of Evidence Held not Sufficiently Authenticated.

21. Where transcript of testimony was certified by a reporter, with nothing to indicate that such reporter was the official reporter, and

was not filed with the clerk of the court or authenticated by the certificate of the trial judge, the transcript was not sufficiently authenticated for consideration by Supreme Court under Sections 554, 927, 929, 931, 932, L. O. L. (Nealan v. Ring, 490.)

Appeal and Error—Trial Judge may Authenticate Report of Testimony, Regardless of Whether There is an Official Reporter.

22. It is competent for the trial judge to authenticate a report of testimony whether there is an official reporter or not. (Nealan v. Ring, 490.)

Appeal and Error—Only Question in Absence of Transcript is Sufficiency of Pleadings to Sustain Decree.

23. In absence of properly authenticated evidence, the only question to be considered on appeal is when the pleadings are sufficient to uphold the decree. (Nealan v. Ring, 490.)

Appeal and Error—Transcript of Evidence—Failure to have Same Properly Authenticated—Effect—When Application to Amend Transcript Deemed too Late.

24. Where appellant has failed to have a properly certified transcript made and filed, and no application to amend the same was made until after cause had been argued and submitted and an opinion handed down by the appellate court, *held*, the application comes too late. (Nealan v. Ring, 490.)

Appeal and Error—Findings in Equity as to Fraud are of Influence, but not Controlling.

25. In a suit in equity, findings by the trial judge who saw and heard the witnesses as to the existence of the alleged fraud are of influence on appeal, but are not controlling. (White v. Harrison, 508.)

Appeal and Error—Verdict Held to have Been Based on Insufficient Cause of Action.

26. Where numerous cases were consolidated for trial, all of them involving a cause of action for interference with one ditch and some of them involving also a second cause of action for interference with another ditch, and the jury reported that it found for the plaintiffs as to interference with the first ditch, but for defendant as to interference with the second ditch, but, after being instructed by the judge to return only one verdict either for plaintiff or defendant in each case, they returned a verdict for plaintiff in each case, it was manifest they found for defendants on the second cause of action, so that on deciding that first cause of action was insufficient, second cause will not be considered, it being analogous to moot case, but judgment will be reversed. (Slayton v. Twohy Bros. Co., 535.)

Appeal and Error—Assumption of Burden by Respondent—Harmless Error.

27. Where real question in dispute in action by grantee against grantor for breach of a covenant against encumbrances was whether defendant or plaintiff was entitled to rent which accrued after the execution of the warranty deed, defendant cannot complain that case was tried on the theory that plaintiff must show that his

title was to relate back prior to the time lessee made a payment to defendant of rent for the ensuing year. (*Winn v. Taylor*, 556.)

Appeal and Error—Theory of Trial must be Adhered to.

28. The theory upon which the case was tried in the court below must be strictly adhered to on appeal. (*Winn v. Taylor*, 556.)

Appeal and Error—Theory Determined from Entire Record and Brief.

29. The theory on which the case was tried below, which governs on appeal, must be determined from the entire record and the briefs of counsel, construing the pleadings on the theory most apparent, most clearly outlined by the facts stated, and according to their general scope and tenure. (*Winn v. Taylor*, 556.)

Appeal and Error—General Demurrer Could not Reach Defect of Parties not Affecting Cause as a Whole.

30. In an action by creditors against a portion of stockholders of insolvent corporation, where there was nothing in the pleadings to show that suit was instituted to wind up affairs of corporation, or that it was necessary to ascertain the whole amount of indebtedness, the creditors, or subscribers, who were liable for unpaid stock, suit being brought solely "to obtain the payment of the plaintiffs' judgment, and it does not appear by the bill or otherwise that there are any other creditors who wish to be made parties," the defendants cannot, on appeal, urge by reason of such defect of parties that their general demurrer of no cause of action should have been sustained. (*Razor v. West Coast Development Co.*, 581.)

Appeal and Error—"Adverse Party" as Respects Notice of Appeal Defined.

31. An "adverse party," with reference to the requisite of service of notice of appeal under Section 550, L. O. L., is a plaintiff or defendant whose interest in regard to the judgment or decree appealed from is in conflict with a reversal or modification of the judgment or decree sought to be reviewed on appeal. (*First Nat. Bank v. Halliday*, 649.)

Appeal and Error—In Suit to Set Aside Fraudulent Conveyance from Mother to Son, Mother Held "Adverse Party" as Respects Son.

32. In suit by judgment creditor of a mother to set aside as fraudulent a conveyance by the mother to the son, where the son appealed from a judgment setting aside the conveyance and subjecting the property to the judgment, subject, however, to a lien in favor of the son for money paid upon a superior mortgage and other claims, the mother, who had appeared in the suit, was, as respects the requirement of Section 550, L. O. L., of service of notice of appeal on adverse party, and where the son did not serve notice of appeal on her, his appeal must be dismissed. (*First Nat. Bank v. Halliday*, 649.)

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ASSAULT AND BATTERY.

Assault and Battery—Identity of Policeman to Whom Defendant Gave Pistol Previously Taken from a Policeman Held Immaterial.

1. In prosecution for assault and battery committed by defendant in taking pistol from policeman during policeman's fight with fugitive, testimony as to whether defendant gave pistol to such policeman on command of another policeman, or gave it directly to such other policeman, *held* immaterial. (State v. Steidel, 681.)

Assault and Battery—Defendant Held Entitled to Submission of Self-defense Issue in View of Evidence.

2. In prosecution for assault and battery in taking pistol from a police officer during officer's fight with person being arrested, where there was evidence which would have warranted jury in finding that defendant did not know that one of men was a police officer, that during the rough-and-tumble fight the pistol had been discharged three or four times, that defendant honestly believed that he was in danger of death or great bodily harm by the careless discharge of the pistol, the defendant was entitled to instructions submitting issue of self-defense, since, if defendant believed himself or others in danger of bodily harm, he had a right to take pistol, under Sections 1806 and 1898, Or. L. (State v. Steidel, 681.)

Assault and Battery—Defendant may Prove Self-defense Under Plea of not Guilty.

3. In view of Section 1500, Or. L., defendant accused of assault and battery is not required to enter a plea of self-defense, but is entitled to prove self-defense under the plea of not guilty. (State v. Steidel, 681.)

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Attorney and Client—Attorney may Purchase Land Sold Under Judgment Against His Client After Relation Terminated.

2. Where suit against client was brought in 1914 and judgment against her was enrolled the same year, the entry of which ended the relations between her and her counsel, he claiming compensation unpaid, a purchase by him under execution sale under such judgment in 1917 was not fraudulent. (Crim v. Thompson, 599.)

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BILLS AND NOTES.

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Bills and Notes—One Placing His Name on the Back of a Note Held an Indorser.

2. Under Section 7855, Or. L., declaring that anyone placing his signature upon an instrument otherwise than as maker, drawer or acceptor is deemed an indorser unless he clearly indicates his inten-

tion to be bound in some other capacity, and in view of Section 7856, declaring that an individual not otherwise a party who places his signature on a note in blank before delivery is liable as an indorser, defendant, who placed his name on the back of a note without any notation indicating his intention to be otherwise bound, is liable only as an indorser. (*First Nat. Bank v. Bach*, 332.)

Bills and Notes—To Hold Indorser, Presentment must be Shown or Excused.

3. While Section 7872, Or. L., provides that presentment is not required in order to charge an indorser, where the instrument was made or accepted for his accommodation, and Section 7907 provides that notice of dishonor is not necessary in such case, in all other cases presentment for payment as provided for by Section 7863 and notice of dishonor in accordance with Section 7881 must be given to charge an indorser, or the failure excused. (*First Nat. Bank v. Bach*, 332.)

Bills and Notes—Indorser Held not Person Accommodated, and so Presentment and Notice of Dishonor was Necessary—"Accommodation Party."

4. Where a debtor accepted drafts drawn by defendant, such drafts being discounted on defendant's indorsement, and on maturity of acceptances a note was given for the amount of the drafts which defendant indorsed for the accommodation of his debtor, the instrument was not given for defendant's accommodation, nor was he the party "accommodated," within Or. L., § 7821, defining an "accommodation party" as one who signs an instrument as maker, drawer, acceptor, or indorser, without receiving value therefor, and for the purpose of lending his money to another, the accommodation being to the debtor; hence, to hold defendant, it is essential to show presentment for payment and notice of dishonor. (*First Nat. Bank v. Bach*, 332.)

BREACH OF COVENANT.

Measure of Damages as to Encumbrance Stated.

See Covenants, 3.

As to Existing Lease Gives Right of Action by Grantee for Rental Value.

See Covenants, 5.

Grantor's Covenant Against Known and Unknown Encumbrance Protects Grantee Against the Same.

See Covenants, 6.

BURDEN OF PROOF.

See Appeal and Error, 27.

See Covenants, 2.

Burden of Proving Agency in Satisfaction of a Mortgage Held by Mortgagor.

See Principal and Agent, 2.

Burden of Proving Fraud by Vendor Rests on Purchaser.

See Vendor and Purchaser, 1.

CERTIORARI.

Certiorari—Writ of Review Lies from Circuit Court to County Court Which Entertained Widow's Contested Proceeding for Admeasurement of Dower—"Inferior Court."

1. Any court, as the County Court, subject to the appellate jurisdiction and supervisory control of the Circuit Court under Article VII, Section 9, of the Constitution, is an "inferior court," within the meaning of the statutes, authorizing writ of review from the Circuit to the County Court, so that writ of review from the Circuit Court will lie to review the action of the County Court in entertaining a widow's proceeding, contested by heirs, for admeasurement of dower. (Cole v. Marvin, 175.)

CHATTEL MORTGAGES.

Chattel Mortgages—Sale of Crop by Mortgagor—Right to Proceed as Between Warehouseman and Mortgagee.

1. In a mortgagee's suit to foreclose a chattel mortgage, brought against mortgagor and purchasing warehouseman, to recover for mortgaged growing crop, harvested and delivered to the warehouseman, and by him purchased, in the absence of an agreement on the part of the mortgagee, the chattel mortgage was a prior lien over the charges for sacking, hauling and shipping the grain. (Wilson v. North Powder Milling Co., 364.)

Chattel Mortgages—Sale of Crop by Mortgagor—Rights of Mortgagee as Against Separate Agreement Between Mortgagor and Thresherman.

2. In a mortgagor's suit to foreclose a chattel mortgage, brought against mortgagor and purchasing warehouseman, to recover for mortgaged growing crops harvested by mortgagor and delivered by him through arrangement with another to the warehouseman, in the absence of agreement on the part of the mortgagee, an intervening thresherman could not be paid his threshing charges by the warehouseman, even though there was an agreement by the mortgagor-grower and the thresherman to the effect that the thresherman should have his money out of the sale of the grain. (Wilson v. North Powder Milling Co., 364.)

Purchaser of Mortgaged Crops After Good Faith Settlement With Mortgagee Could not Refuse to Pay Agreed Amount Because of Unfiled Thresherman's Lien Claim Subsequently Presented to Purchaser.

See Compromise and Settlement, 1.

Evidence Held not to Prove Agency to Accept Deed in Satisfaction of Chattel Mortgage.

See Deeds, 1.

The Fact That a Chattel Mortgage Pertained to Firm Matters may be Proved by Testimony.

See Evidence, 2.

Managing Partner may Bind Firm by Chattel Mortgage in Own Name.

See Partnership, 1.

Chattel Mortgage in Name of One Partner Held Obligation on Firm.
See Partnership, 2.

Facts Held not to Show Conspiracy by One Partner and Mortgagee to Defraud Other Partners.
See Partnership, 3.

Burden of Proving Agency in Satisfaction of a Mortgage Held by Mortgagor.
See Principal and Agent, 2.

CIRCUMSTANTIAL EVIDENCE.

Instruction on Circumstantial Evidence Improper.
See Criminal Law, 6.

Distance of Witnesses from Scene Does not Make Testimony Circumstantial so as to Require Instruction Thereon.
See Criminal Law, 16.

CLOUD ON TITLE.

See Quieting Title, 1, 2.

COMMERCE.

Commerce—Federal Liability Act Exclusive as to Injuries from Handling Interstate Commerce.

1. Federal Employers' Liability Act, as amended by Act of April 5, 1910 (U. S. Comp. Stats., §§ 8657-8665), is an exercise of the paramount authority of Congress over interstate commerce, so that such statute controls all litigation for injuries growing out of the handling of interstate commerce. (*Wintermute v. Oregon-Wash. R. & N. Co.*, 431.)

Commerce—Prohibition of Sale of Fish Caught Outside Limits not Regulation of Foreign or Interstate Commerce.

2. Laws of 1919, page 658, Section 5, prohibiting the sale or possession within the state of salmon caught beyond the three-mile limit outside the Columbia River, does not contravene the foreign and interstate commerce clause of the federal Constitution. (*Union Fishermen's Co. v. Shoemaker*, 659.)

COMPROMISE AND SETTLEMENT.

Compromise and Settlement—Purchaser of Mortgaged Crops After Good Faith Settlement With Mortgagee Could not Refuse to Pay Agreed Amount Because of Unfiled Thresherman's Lien Claim Subsequently Presented to Purchaser.

1. Where purchaser of mortgaged crops made settlement in good faith with mortgagee as to amount due mortgagee and mailed mortgagee a check for the agreed amount, it could not thereafter recall check and refuse to pay such amount by reason of third person's claim for services in threshing the crop, for which no lien had been filed, as required by Section 10230 et seq., Or. L. (*Wilson v. North Powder Milling Co.*, 364.)

CONCLUSIONS OF LAW.

Of Pleader cannot Vary Liability of One Executing Note.

See Pleading, 6.

Cannot be Substituted for Statements of Fact.

See Pleading, 12.

CONCLUSIVENESS.

Opinion Looked to, to Determine Matters Concluded.

See Judgment, 1.

Conclusive on Matters in Issue.

See Judgment, 2.

Conclusive Irrespective of Form of Action.

See Judgment, 3.

CONDEMNATION PROCEEDINGS.

See Eminent Domain, 2-6.

CONFESSION.

Voluntary Confession Admissible, Though Accused was not Cautioned.

See Criminal Law, 18.

Compliance With Statute must be Shown Before Preliminary Statement Made to Committing Magistrate may be Admitted in Evidence.

See Criminal Law, 37.

Confession Made to District Attorney Admissible as Extrajudicial Confession and not Under Statute.

See Criminal Law, 38.

For Definition of "Confession," "Judicial Confession" and "Extrajudicial Confession."

See Criminal Law, 39.

Inadmissible Where Obtained by Inducement of Person in Authority.

See Criminal Law, 40.

Determination of Court as to Competency not Disturbed Unless Clearly Erroneous.

See Criminal Law, 41.

While in Custody of Officers, Confession is not Inadmissible.

See Criminal Law, 42.

Extrajudicial Confession of Defendant Written Out by District Attorney and Signed is Admissible.

See Criminal Law, 43.

CONSIDERATION.

Adequacy of Consideration not Inquired into.

See Contracts, 6.

Influence and Goodwill in Promoting Construction of Railroad is not a Valid Consideration for Stock.

See Corporations, 7.

Contradicting Consideration Clause, When Inadmissible.

See Evidence, 10, 11.

Contractual Consideration cannot be Added to Money Consideration.

See Evidence, 12.

Parol Evidence Admissible to Show Want or Failure of Consideration.

See Evidence, 13.

CONSPIRACY.

See Partnership, 3.

CONSTITUTIONAL AMENDMENT.

Legislative Restriction on Bonded Debt Limit Repealed by Constitutional Amendment.

See Counties, 1.

Statute for Election on Bond Issue Repealed by Constitutional Amendment—Only as to Limit of Indebtedness.

See Counties, 2.

CONSTITUTIONAL LAW.

Constitutional Law—Constitution "Self-executing" When Intended to Go into Immediate Effect.

1. A constitutional provision is "self-executing," when there is manifest intention that it should go into immediate effect, and no ancillary legislation is necessary to the enjoyment of the right given or the enforcement of a duty imposed, even though such right may be better or further protected by supplementary legislation. (Ladd & Tilton Bank v. Frawley, 241.)

Constitutional Law—Constitutional Amendment Increasing Limit for Bond Debt is Self-executing.

2. The amendment to Article XI, Section 10, of the Constitution, adopted in 1919, whereby the limit of indebtedness which a county could incur with approval of its electors was increased from 2 per cent to 6 per cent of its assessed valuation, was self-executing, though it was worded as a restriction on the power of the counties to incur indebtedness greater than 6 per cent, especially in view of the argument in the voters' pamphlet that the amendment gave the counties such power, and the fact that the legislature in submitting a later similar amendment apparently regarded the provision as self-executing. (Ladd & Tilton Bank v. Frawley, 241.)

Constitutional Law—Statutes Inconsistent With Amendment are Void.

3. Even though a constitutional amendment is not self-executing as to all its provisions, it is self-executing to the extent that it nullifies all existing statutes or portions thereof which are inconsistent with its provisions, as well as such statutes as may be subsequently passed. (*Ladd & Tilton Bank v. Frawley*, 241.)

Constitutional Law—Curative Amendment not Construed as Dependent on Legislation.

4. A constitutional amendment designed to cure a defect in the law or to remove an existing mischief should never be construed as dependent for its efficacy and operation on legislative will. (*Ladd & Tilton Bank v. Frawley*, 241.)

Constitutional Law—"Police Power" Defined.

5. Police power, is the power to make all laws which, in contemplation of the Constitution, promote the public welfare, and it embraces the inherent sovereign power of the state, within constitutional limitations, to promote the order, safety, health, morals and general welfare of society. (*Union Fishermen's Co. v. Shoemaker*, 659.)

Constitutional Law—Final Determination of Limits of Police Power is for Courts.

6. The legislature is not the final judge of the limitations of the police power, and since its action must be reasonably necessary for the public benefit, the validity of all police regulations depends upon the judicial test of reasonableness, though the legislature must primarily determine the necessity or expediency of the measures adopted. (*Union Fishermen's Co. v. Shoemaker*, 659.)

Constitutional Law—Legislature has Large Discretion Under Police Power.

7. The courts, in applying the judicial test of reasonableness to a statute enacted under the police power, will accord to the legislature a large discretion in determining, not only what the public interests require, but also what measures are necessary for the protection of such interests. (*Union Fishermen's Co. v. Shoemaker*, 659.)

Constitutional Law—Statutes Presumed Valid.

8. In applying the test of judicial reasonableness to an act passed under the police power, the presumption is in favor of the reasonableness and validity of the regulation. (*Union Fishermen's Co. v. Shoemaker*, 659.)

Constitutional Law—Wisdom of Legislation is not Question for Courts.

9. Laws of 1919, page 653, Section 5, regulating salmon fishing in the Columbia River and forbidding the use of purse seines, etc., on the Oregon side, cannot be held unconstitutional because the law works harshly against the Oregon canneries, the State of Washington providing no similar restrictions; the wisdom of the act being for the legislature. (*Union Fishermen's Co. v. Shoemaker*, 659.)

Under the Constitution, a Verdict Supported by Some Evidence is not Reviewable.

See Appeal and Error, 15.

CONSTRUCTION.

Curative Amendment not Construed as Dependent on Legislation.

See Constitutional Law, 4.

Construction of Statute by Circuit Courts do not Bind Supreme Courts.

See Courts, 8.

Statute Providing for Execution of Contractor's Bonds Liberally Construed.

See Municipal Corporations, 1.

Legislative Intent Controls Construction.

See Statute, 1.

Statutes Construed to Give Effect to Every Clause, if Possible.

See Statutes, 2.

Statutes Construed to Ascertain Intent of Legislature.

See Statutes, 3.

If Intent not Ascertainable, Reasonable Construction Adopted.

See Statutes, 4.

CONTRACTOR'S BOND.

See Municipal Corporations, 1-3.

CONTRACTS.

Contracts—Complaint for Breach of Hauling Contract Held not Demurrable.

1. In action for breach of hauling contract, complaint *held* not demurrable. (Johnson v. Homestead-Iron Dykes Mines Co., 318.)

Contracts—Mutuality Required.

2. A promise made by one party without a corresponding consideration, obligation or promise made by the other is void. (Johnson v. Homestead-Iron Dykes Mines Co., 318.)

Contracts—To be Construed as a Whole.

3. A contract must be construed as a whole; every paragraph, every sentence, clause, phrase and word must be considered in interpreting its meaning. (Johnson v. Homestead-Iron Dykes Mines Co., 318.)

Contracts—Option to Continue Hauling Contract not Void for Want of Mutuality.

4. Provision in concentrates hauling contract that, after 1,600 tons of concentrates had been hauled, the contractor should have the preference right to continue hauling so long as the other party

had any hauling to be done, was not void for lack of mutuality where the contractor purchased a motor truck, hauled 1,600 tons, exercised his preference right, and continued to haul until he had transported 4,300 tons, when the other party attempted to rescind. (*Johnson v. Homestead-Iron Dykes Mines Co.*, 318.)

Contracts—Unilateral Contract may be Made Mutual by Performance.

5. Where the promise consists of the doing of an act by another, and the latter does the act, the contract is not void for want of mutuality. (*Johnson v. Homestead-Iron Dykes Mines Co.*, 318.)

Contracts—Adequacy of Consideration not Inquired into.

6. The law will not inquire as to the adequacy of a consideration, but anything which fulfills the requirements of consideration will support a promise, whatever may be the comparative value of the consideration and of the thing promised. (*Johnson v. Homestead-Iron Dykes Mines Co.*, 318.)

Contracts—"Unavoidable Serious Accident" Defined.

7. In a contract barring liability for delays caused by "unavoidable serious accidents," such an accident means unusual, unexpected and unintended occurrence, not brought on by failure to exercise ordinary care and prudence, and of such character that the parties could not reasonably have contemplated the same at the time of the contract to take adequate precautions to prevent it by the exercise of ordinary diligence, prudence and foresight, and which causes such interference and resulting delay as could not by such diligence, prudence and foresight have been avoided. (*Johnson v. Homestead-Iron Dykes Mines Co.*, 318.)

Contracts—Whether Delay Excusable as Caused by Unavoidable Serious Accident Held for Jury.

8. Under a concentrates hauling contract, barring delays caused by unavoidable serious accidents, where the contractor's truck, while hauling a load of concentrates, for some unexplained reason, and without negligence of the contractor or his agents, left the road and rolled down a steep embankment, injuring the driver and damaging the truck, and the accident, according to the evidence, resulted in some delay, whether such delay was excusable as caused by an unavoidable serious accident was for the jury. (*Johnson v. Homestead-Iron Dykes Mines Co.*, 318.)

Contracts—Complaint must Show Performance or Waiver of Conditions.

9. A party seeking to recover on a contract must show in his complaint either that he has performed all of the conditions on his part to be performed or that performance has been waived by the defendant. (*Clerin v. Eccles*, 345.)

Contracts—Variance Held Immaterial as not Misleading.

10. In applying the general rule that a plaintiff declaring on a written contract cannot recover on an oral contract or one partly oral, Section 97, Or. L., making variance immaterial unless it actually misled the adverse party to his prejudice must be considered,

and a variance between allegation of a written contract and proof of one partly oral was not prejudicial where the other party alleged the oral agreement. (Winn v. Taylor, 556.)

See Corporations, 1, 4.

See Receivers, 1, 2.

See Specific Performance, 1-3, 6.

See Waters, 8.

Loss of Profits from Breach of Contract.

See Damages, 1.

Contract Provisions as to Covenants Connected With Title or Possession Merged in Deed.

See Deeds, 2.

Contract Merged in Deed.

See Deeds, 3.

Lessee's Contract With Lessor's Grantee, Stipulating Damages, is not Binding on Lessor.

See Landlord and Tenant, 6.

Contract Between Lessee and Purchaser from Landlord Held a Novation.

See Landlord and Tenant, 8.

Agreement Between Purchaser of Land and Tenant Induced by Fraud, No Obstacle to Enforcement of Original Lease by Tenant.

See Landlord and Tenant, 9.

Tenant not Entitled to Destroy and Also Enforce Fraudulently Procured Agreement of Attornment.

See Landlord and Tenant, 10.

CONTRIBUTORY NEGLIGENCE.

See Master and Servant, 2.

CORPORATIONS.

Corporations—Strict Compliance With Contract of Sale of Stock Waived by Buyer so That One of the Sellers was Entitled to Maintain Separate Action.

1. Where plaintiff and his associates agreed to sell to defendants their shares of the stock of a corporation, the agreement to be evidenced by the joint and several notes of one of the defendants payable to plaintiff and his associates as their interest appeared, the contract, which required a sale by all of the plaintiffs, is joint and several between the parties on either side, but where, on plaintiff's transfer of his stock, defendants accepted it and gave a note, plaintiff's associates, though ready and willing, not yet having transferred their stock, strict compliance with the contract was waived by defendants, and plaintiff may maintain in his own name an action on the note given him without joining his former fellow stockholders. (Clerin v. Eccles, 345.)

Corporations—Buyer of Stock Held Entitled Either to Rescind or Counterclaim for Damages.

2. Where plaintiff and his several associates agreed to sell to defendants all of their holdings in the stock of a corporation, and plaintiff's associates failed to transfer their shares, defendants, notwithstanding plaintiff's performance, may rescind the contract, being joint, or they may, when sued for the purchase price, counterclaim for damages for breach of the conditions as to the joint sale. (Clerin v. Eccles, 345.)

Corporations—Pledge of Corporate Stock Does not Deprive Pledgor of All Property Rights.

3. The pledge of corporate stock does not deprive the pledgor of all of his property rights therein. (Clerin v. Eccles, 345.)

Corporations—Notice of Rescission of Contract to Purchase Corporate Stock Necessary, Though Stock Pledged With Seller to Secure Purchase-money Note.

4. Where plaintiff and his associates agreed to sell defendants their holdings in the stock of a corporation, and plaintiff delivered his stock, receiving a note for the purchase price, the stock being pledged with him to secure payment, notice of rescission on account of the failure of his associates to perform is necessary; the general rule being applicable, despite defendants' contention that notice is not necessary where the consideration has wholly failed, for the pledge of the stock to secure the note did not deprive defendants of all property rights therein. (Clerin v. Eccles, 345.)

Corporations—Recaption of Stock Held not Exclusive Remedy of Seller.

5. Where plaintiff and his associates agreed to sell their holdings of corporate stock to defendants, and plaintiff made delivery, receiving a note for the purchase price, a provision of the contract permitting the sellers to declare a breach of the contract and resume ownership of the stock on default in payment of the note did not make recaption of the stock, which was redelivered to plaintiff as a pledge to secure payment of the note, his exclusive remedy. (Clerin v. Eccles, 345.)

Corporations—Evidence Held to Show Stock to be Unpaid for.

6. In an action against stockholders of an insolvent corporation, evidence held to show that the sole consideration for the stock held by the defendants was their goodwill and influence in promoting a railroad to be built by the corporation. (Razor v. West Coast Development Co., 581.)

Corporations—Goodwill and Influence in Promoting Construction of Railroad not Valid Consideration for Stock.

7. The mere use of goodwill and influence in promoting the construction of a railroad was neither a valid nor a valuable consideration for corporate stock, as far as liability of stockholders to creditors was concerned. (Razor v. West Coast Development Co., 581.)

Corporations—One not Actually Receiving Stock Held Equitable Owner and Liable to Creditors.

8. One, who was president and director of a corporation, voted for and appointed a committee of appraisers of options and con-

tracts, and voted for the adoption of its report, and agreed that the person obtaining the contracts and options was to receive certain stock therefor, which was to be apportioned among the officers, including the president, the stock being issued to the person furnishing the options and contracts pursuant to such agreement, was in equity and good conscience the owner and holder of the stock which he was to receive, even though he did not actually receive it, and he was liable to creditors as a subscriber for stock, on the corporation becoming insolvent. (*Rasor v. West Coast Development Co.*, 581.)

Corporations—Creditors had Right to Assume That Capital Stock was of Par Value.

9. In the absence of knowledge of the actual facts or conditions under which stockholders of a corporation acquired their stock, creditors had the right to assume that the corporation was organized according to ordinary business practices, and that its capital stock was of par value, and was paid for on that basis. (*Rasor v. West Coast Development Co.*, 581.)

COSTS.

Costs—Party Prevailing on Appeal Held not Entitled to Costs.

10. It is a rule that a party prevailing on appeal is entitled to recover costs and disbursements; but such party will not be allowed costs, where it is not fair, right or just to exact costs from the other party. (*Dippold v. Cathlamet Timber Co.*, 183.)

COUNTERCLAIM.

Stockholder Entitled to Rescind Contract for Purchase of Stock or Counterclaim for Damages.

See Corporations, 2.

COUNTIES.

Counties—Legislative Restriction on Bonded Debt Limit Repealed by Constitutional Amendment.

1. The provision of Laws of 1913, Chapter 103, Section 19, that no bonded indebtedness issued under the act should exceed 2 per cent of the assessed valuation of the county, was merely to call attention to the then existing limit prescribed by the Constitution, not to fix a separate limit by legislation, since the whole act clearly indicates that it was intended to provide a mode for the issuance of bonds by the counties, and that provision was repealed impliedly by the amendment to Article XI, Section 10, of the Constitution, in 1919, which increased the limit from 2 per cent to 6 per cent. (*Ladd & Tilton Bank v. Frawley*, 241.)

Counties—Statute for Election on Bond Issue Repealed by Constitutional Amendment Only as to Limit of Indebtedness.

2. Since the statute is impliedly repealed by a subsequent statute or constitutional provision only to the extent that it is clearly repugnant thereto, Laws of 1913, Chapter 103, providing for the method of election in counties for the issuance of bonds, was repealed by the amendment in 1919 to Article XI, Section 10, of the Constitution, increasing the limit of indebtedness which counties

might incur only to the extent that the statute prescribed such limit, and bonds could therefore be issued to the amount limited by the amendment after proceedings in conformity with the other provisions of that statute. (*Ladd & Tilton Bank v. Frawley*, 241.)

COUNTY COURTS.

See Certiorari, 1.
See Courts, 1, 2.
See Dower, 1.

COUNTY ROADS.

See Highways, 1.

COURTS.

Courts—"Inferior Courts" Defined, and Held Proceedings must Show Jurisdiction.

1. Used in a narrow and technical sense, the words "inferior courts" mean courts of a special and limited jurisdiction, which are created on such principles that their judgments taken alone are entirely disregarded, and the proceedings must show their jurisdiction. (*Cole v. Marvin*, 175.)

Courts—Holding That County Court is "Court of General and Superior Jurisdiction" Means Record Imports Verity.

2. The holding that in probate matters the County Court is a "court of general and superior jurisdiction" simply means that its record imports absolute verity, and cannot be collaterally attacked. (*Cole v. Marvin*, 175.)

Courts—Not having Jurisdiction of Subject Matter, Court can Consider No Other Question.

3. When a court has determined that it has no jurisdiction of the subject matter of an action, it cannot properly consider any other question raised in the case. (*Dippold v. Cathlamet Timber Co.*, 183.)

Courts—Jurisdiction of Courts Defined by Organic and Statutory Laws.

4. The organic and statutory laws of the commonwealth created the courts and defined their jurisdiction, and jurisdiction cannot flow from any other source, and the law must confer upon the courts the power to act on the subject matter on which it gives judgment. (*Dippold v. Cathlamet Timber Co.*, 183.)

Courts—Jurisdiction to be Determined in First Instance by Allegations in Complaint.

5. The jurisdiction of the subject matter of any controversy in any court must be determined in the first instance by the allegations in the complaint made in good faith, and does not depend on the existence of a sustainable cause of action or by the evidence subsequently adduced. (*Dippold v. Cathlamet Timber Co.*, 183.)

Courts—Complaint for Damages to Building Out of State Held not to Show Jurisdiction in Court.

6. A complaint in an action for damages to a shingle-mill situated in another state, constructed by plaintiff on the lands of

another person, held insufficient to give the Circuit Court jurisdiction of the subject matter; the mill being *prima facie* real property, the action for damages to which is barred by Section 72, Or. L. (Dippold v. Cathlamet Timber Co., 183.)

Courts—"Jurisdiction of Subject Matter" not Dependent on Ultimate Existence of Good Cause of Action.

7. "Jurisdiction of the subject matter" is the power to adjudge concerning the general question involved, and is not dependent on the ultimate existence of a good cause of action in the plaintiff in a pending cause before the court. (Dippold v. Cathlamet Timber Co., 183.)

Courts—Constructions of Statute by Circuit Courts Do not Bind Supreme Court.

8. The constructions placed on the adultery statute by the Circuit Courts of the state do not bind the Supreme Court, but the rulings are persuasive, and, where the construction has been almost uniform for more than 50 years, it should not be set aside without grave reasons. (State v. Stevenson, 285.)

Courts—Rule Working No Injustice, Acted upon by Profession, Affirmed.

9. Where rule announced by decisions of the Supreme Court, which have been generally received and acted upon by the profession, works no injustice, the decisions will not be overturned. (Nealan v. Ring, 490.)

Final Determination of Limits of Police Power is for Courts.

See Constitutional Law, 6.

Wisdom of Legislature is not Question for Courts.

See Constitutional Law, 9.

COVENANTS.

Covenants—Lease—"Encumbrance."

1. An outstanding lease was an "encumbrance" within the meaning of the covenant of a warranty deed against encumbrances. (Winn v. Taylor, 556.)

Covenants—Lease—Admitting Receipt of Rent—Burden of Proof—Deed.

2. In an action by grantee in a warranty deed, where defendant admitted the execution of the warranty deed and the receipt of rental from a lessee for the ensuing year, it developed upon him to prove his right to retain such rent. (Winn v. Taylor, 556.)

Covenants—Breach of Covenant—Encumbrances—Measure of Damages.

3. When the breach of a covenant against encumbrance in a warranty deed consists of the existence of an unexpired term or lease, the measure of damages, in the absence of any special circumstances, is the value of the use of the premises for the time during which the grantee has been deprived thereof. (Winn v. Taylor, 556.)

Covenants—Interest Allowed Grantee—Action Collecting Rent.

4. Where grantor in warranty deed breached covenant against encumbrances, in that a lease existed, and collected the rental for the ensuing year, to which grantee was entitled, the grantee in an action to recover such rental was entitled to interest on the amount of the rent from the date of collection by the defendant, in view of Section 6028, L. O. L. (Winn v. Taylor, 556.)

Covenants—Breach by Existing Lease Gives Right of Action for Rental Value; "Rent."

5. Where the covenant against encumbrances was breached by an existing lease, the measure of the grantee's damages is the rental value of the land for the time possession is withheld from him, and he may recover the rent for such time collected by the vendor; "rent" being the compensation paid for the use of the demised premises which is treated as a profit arising out of lands and tenants corporeal. (Winn v. Taylor, 556.)

Covenants—Grantor Covenants Against Known and Unknown Encumbrances.

6. The covenant against encumbrances in a warranty deed, protects the purchaser against existing encumbrances of which he has knowledge, as well as against those which are unknown to him. (Winn v. Taylor, 556.)

Covenants—That Tenant Attorned After Expiration of Term for Which Vendor Collected Rent Does not Defeat Purchaser's Right to Rent.

7. Where the vendor collected a year's rent in advance shortly before conveying by warranty deed with covenant against encumbrance, the fact that at the expiration of the time for which rent was collected the tenant attorned to the purchaser does not defeat the purchaser's right to recover from the vendor the rental value prior to that time. (Winn v. Taylor, 556.)

Contract Provisions as to Covenants Connected With Title or Possession Merged in Deed.

See Deeds, 2.

In Lease to Quiet Enjoyment.

See Landlord and Tenant, 1-3.

CREDITORS.**One not Actually Receiving Stock Held Equitable Owner and Liable to Creditors.**

See Corporations, 8.

Had Right to Assume That Capital Stock was of Par Value.

See Corporations, 9.

CRIMINAL LAW.**Criminal Law—Admission of Evidence of Experiments or Demonstrations Discretionary.**

1. Admission of evidence of experiments or demonstrations is discretionary with trial court; but when it appears that the experi-

ment or demonstration has been made under conditions similar to those existing in the case in issue, its discretion ought not to be interfered with. (State v. Holbrook, 43.)

Criminal Law—Admission of Evidence as to Experiments Held not an Abuse of Discretion.

2. In homicide prosecution, admission of evidence as to experiments in tracing footprints, and in discharging rifle with certain kind of cartridge, to ascertain whether smoke could be seen from the discharge, where experiments were made under same conditions as existed on day of killing, *held* not an abuse of discretion. (State v. Holbrook, 43.)

Criminal Law—Declarations of Deceased's Employee not Binding on Deceased.

3. In homicide prosecution, declarations by employee of deceased as to what deceased was going to do could not bind the deceased. (State v. Holbrook, 43.)

Criminal Law—Cross-examination to Impeach by Inconsistent Statements cannot be Justified on Ground That It Shows Bias and Prejudice.

4. When counsel informs court that he is proceeding to impeach the witness by inconsistent statements, he must adhere to that theory, and cannot justify examination on the ground that it is proper cross-examination for purpose of showing bias or prejudice, as a party cannot mislead the court and invite error. (State v. Holbrook, 43.)

Criminal Law—Evidence of a Conversation Five Days Before Killing Held not Admissible as Res Gestae.

5. In prosecution for homicide committed as the result of a dispute in regard to the use of land for grazing, evidence as to a conversation between an employee of the deceased and a brother of one of the defendants five days before the killing *held* not admissible as a part of the *res gestae*. (State v. Holbrook, 43.)

Criminal Law—Instruction on Circumstantial Evidence Improper, Where Direct Evidence of Corpus Delicti.

6. If there is any direct testimony respecting the *corpus delicti*, an instruction on circumstantial evidence is properly refused. (State v. Holbrook, 43.)

Criminal Law—Instructions to be Directed to All of Legitimate Testimony.

7. The court is required to frame its instructions, so that the attention of the jury shall be directed to all of the legitimate testimony, not excluding any particular part. (State v. Holbrook, 43.)

Criminal Law—Evidence Required to Prove Charge Merely Beyond Reasonable Doubt.

8. The evidence for the prosecution need not go further than to convince the jury beyond a reasonable doubt, to a moral certainty, of the truth of the charge. (State v. Holbrook, 43.)

Criminal Law—Guilt or Innocence a Question for Jury.

9. The question of defendant's guilt or innocence is exclusively for the jury; the Supreme Court's only duty on appeal being to ascertain whether there was sufficient evidence to carry the case to the jury. (State v. Holbrook, 43.)

Criminal Law—Question on Which Evidence is Conflicting is for the Jury.

10. Where the evidence was conflicting, the question of defendant's guilt or innocence was for the jury. (State v. Holbrook, 43.)

Criminal Law—Exclusion of Evidence not Considered in Absence of Answer and Specification in Brief.

11. Refusal to permit answer to question will not be considered where record does not disclose answer witness would have given, if permitted to testify, and where appellant fails to point out in his brief wherein he was injured by the refusal to permit witness to answer. (State v. Holbrook, 43.)

Criminal Law—Error not Listed Among Assignments not Considered.

12. Alleged error not listed among the assignments of error will not be considered. (State v. Holbrook, 43.)

Criminal Law—Defendant's Reputation Confined to Trait Involved in Offense Charged.

13. Generally, evidence as to defendant's reputation must be confined to the trait involved in the crime charged. (State v. Holbrook, 43.)

Criminal Law—Appellants cannot Complain of Testimony, in Absence of Motion to Strike or Objection.

14. Appellants cannot complain of admission of testimony to which they did not object, and which they did not move to have stricken. (State v. Holbrook, 43.)

Criminal Law—Homicide—Rule That Assignments not Argued are Waived Disregarded in Homicide Prosecution.

15. Generally, assignments of error not argued by appellant will be treated as having been waived, but such rule will be disregarded in homicide prosecutions, since in such cases the liberties of the defendants are involved. (State v. Holbrook, 43.)

Criminal Law—Distance of Witnesses from Scene Does not Make Testimony Circumstantial so as to Require Instruction Thereon.

16. The fact that witnesses who testified to seeing the petitioning defendant raise his arm and shoot were so far from the scene of the shooting that they could hear none of the conversation between the parties does not make their testimony circumstantial, so as to entitle that defendant to an instruction as to conviction on purely circumstantial evidence. (State v. Holbrook, 43.)

Criminal Law—Motion in Arrest, Filed Two Days After Verdict, but Before Entry of Judgment, is in Time.

17. Under Sections 175, 1559, 1560, L. O. L., prescribing the time for filing motions for new trial, and requiring a motion in arrest to

be filed within the same time, a motion in arrest, filed two days after verdict, but before entry of judgment, is in time. (State v. Gates, 110.)

Criminal Law—Voluntary Confession Admissible, Though Accused was not Cautioned.

18. A confession made while in custody, not induced by threats or promises of immunity, is admissible, though accused was not cautioned that it might be used against him nor advised as to his legal rights. (State v. Wilder, 130.)

Criminal Law—Bad Faith of Prosecuting Officer in Asking Impeaching Question not Presumed.

19. In the absence of evidence on the subject, bad faith on the part of the prosecuting officer in asking defendant an impeaching question cannot be presumed, though he did not follow this with testimony of an impeaching witness. (State v. Wilder, 130.)

Criminal Law—Court's Attention must be Directed to Failure to Instruct.

20. Failure of the court to instruct on pertinent matters is not error when the court's attention is not directed thereto. (State v. Wilder, 130.)

Criminal Law—Requested Instruction on Reasonable Doubt Properly Refused Where Covered by Instructions Given.

21. Requested instruction on reasonable doubt *held* covered by instructions given, so that its refusal was not error. (State v. Wilder, 130.)

Criminal Law—Instruction Assuming Evidence of Good Character Properly Refused.

22. Requested instruction as to consideration of evidence of good character was properly refused, it assuming there was such evidence, but the transcript of the testimony containing none. (State v. Wilder, 130.)

Criminal Law—Essentials to New Trial on Newly Discovered Evidence.

23. Newly discovered evidence to justify a new trial must be such as would probably change the result, it must have been discovered since the trial, it must be such as could not have been discovered before the trial by the exercise of due diligence, it must be material, it must not be cumulative merely, and it must not be merely impeaching. (State v. Evans, 214.)

Criminal Law—Defendant's Knowledge of Occurrence will not Prevent New Trial, Where He Did not Know of Evidence.

24. That defendant knew of the occurrences, newly discovered evidence of which he relied on for new trial is no ground for denying the motion; knowledge of the existence of a fact and of the evidence to prove it being entirely different. (State v. Evans, 214.)

Criminal Law—Newly Discovered Evidence Held not "Cumulative Evidence," and to Justify New Trial.

25. In a prosecution for robbery, where defendant relied on alibi, newly discovered evidence of a traveler, tending to show that

defendant was not at the place of crime on the date specified, as well as other newly discovered evidence, showing defendant's whereabouts in a different place by reason of the fact that on the day of the crime he motored with one witness and did work for other witnesses, etc., is not cumulative within Section 700, L. O. L., defining cumulative evidence as additional evidence of the same character to the same point, and warrants new trial, even though defendant must have known of his whereabouts and might have testified thereto, since, even if he did, there is a great difference between the testimony of an interested witness and that of a disinterested witness. (State v. Evans, 214.)

Criminal Law—Defendant Held to have Shown Diligence so as to be Entitled to New Trial on the Ground of Newly Discovered Evidence.

26. Where defendant, who relied on alibi, inquired of his employers concerning evidence of his whereabouts at the time of the alleged offense, and they disclaimed knowledge of anything in his benefit, evidence of records showing defendant's whereabouts, discovered after the employers' recollections were refreshed by the investigation of another, is ground for new trial, despite the contention defendant did not exercise diligence. (State v. Evans, 214.)

Criminal Law—Where Trial Court Erroneously Determined It had No Discretion to Grant New Trial, Denial will not be Upheld.

27. Where the trial court, under a mistaken view of the precedents, erroneously determined that, under Article VII, Section 3, of the Constitution, as amended (see Laws 1911, p. 7), it had no discretion to grant a new trial on the ground of newly discovered evidence, the denial cannot be upheld on the theory that the discretion of the trial court will not be reviewed. (State v. Evans, 214.)

Criminal Law—Evidence of Prior Identification of Defendant Inadmissible as Self-serving Declaration.

28. In a prosecution for robbery, evidence of the sheriff that the prosecuting witness identified defendant in jail was inadmissible, being in the nature of a self-serving declaration. (State v. Evans, 214.)

Criminal Law—Permission to Introduce in Rebuttal Evidence in Chief Should not be Arbitrarily Granted.

29. Under Section 132, L. O. L., providing that after plaintiff has introduced evidence on his part and has concluded, and defendant has done the same, the parties may then respectively introduce rebutting evidence only, unless the court permits them to introduce evidence upon the original cause of action, permission to the state to introduce on the rebuttal evidence in chief should not be arbitrarily granted out of hand. (State v. Evans, 214.)

Criminal Law—Evidence as to Identification of Prosecuting Witness not Rebuttal.

30. In a criminal prosecution, where the prosecuting witness testified to his identification of defendant and defendant to his protestations of innocence, etc., testimony by the sheriff as to the identification was inadmissible as rebuttal, and should on objection be excluded. (State v. Evans, 214.)

Criminal Law—Weight of Evidence for Jury.

31. The weight of the evidence in a criminal prosecution is exclusively for the jury. (State v. Evans, 214.)

Criminal Law—Order Denying Motion for New Trial Only Reviewable on Appeal from Judgment.

32. An order denying motion for a new trial is not appealable, and, if reviewable at all, can only be reviewed by an appeal from the judgment against which the motion is directed. (State v. Evans, 214.)

Criminal Law—Denial of Motion for New Trial, Based on Insufficiency of Evidence, not Assignable as Error.

33. The denial of a motion for a new trial cannot be assigned as error, and will not be reviewed on appeal, where the motion is based on an alleged insufficiency of the evidence. (State v. Evans, 214.)

Criminal Law—Sufficiency of Evidence Reviewed Where Motion for Nonsuit or Directed Verdict is Made.

34. Accused is always afforded an opportunity to question the sufficiency of the evidence by moving for a nonsuit at the close of the state's case in chief or by moving for a directed verdict when both parties have rested and in that manner preserve the record so that upon appeal the question of the sufficiency of evidence may be reviewed. (State v. Evans, 214.)

Criminal Law—Denial of Motion for New Trial on Ground of Newly Discovered Evidence may be Assigned as Error.

35. An order, denying a motion for a new trial, is assignable as error, and will be reviewed on appeal, if the motion is based upon newly discovered evidence. (State v. Evans, 214.)

Criminal Law—Denial of Motion for New Trial for Newly Discovered Evidence Disturbed Only When There is Abuse of Discretion.

36. The ruling of a trial court denying motion for new trial upon the ground of newly discovered evidence will not be disturbed unless there has been an abuse of discretion, but an accused is entitled to the exercise of a judicial discretion by the trial judge. (State v. Evans, 214.)

Criminal Law—Compliance With Statute must be Shown Before Preliminary Statement to Committing Magistrate may be Admitted.

37. Before the statutory statement made by a defendant at his preliminary examination before a committing magistrate can be admitted in evidence against him at his trial on a criminal prosecution, it must affirmatively appear that notice of right to waive statement required by Section 1781, Or. L., was given. (State v. Stevenson, 285.)

Criminal Law—Confession Made to District Attorney Admissible as Extrajudicial Confession and not Under Statute.

38. Where defendant's alleged confession offered and received in evidence was made to the district attorney at his office in pres-

ence of the sheriff and deputy, and was no part of defendant's preliminary examination, it is admissible, if at all, as an extrajudicial confession, and not under Section 1781, Or. L. (*State v. Stevenson*, 285.)

Criminal Law—"Confession" Defined—"Judicial Confession"—"Extrajudicial Confession."

39. A "confession" is the voluntary admission or declaration made by a person who has committed a crime or misdemeanor to another of the agency or participation which he had in it; "judicial confessions" being those made before a magistrate or court in due course of legal proceedings, and "extrajudicial confessions" being those made elsewhere. (*State v. Stevenson*, 285.)

Criminal Law—Confession Inadmissible Where Obtained by Inducement of Person in Authority.

40. The common-law rules governing the admissibility of confessions are still in force in Oregon, so that a confession is inadmissible where obtained by temporal inducement, by threats, fear, promises or hope of favor held out to the party in respect to his escape from the charge against him by a person in authority. (*State v. Stevenson*, 285.)

Criminal Law—Determination as to Competency of Confession not Disturbed Unless Clearly Erroneous.

41. The competency of a confession as evidence is in the first instance addressed to the court, and its determination will not be disturbed on appeal, unless the record discloses clear and manifest error. (*State v. Stevenson*, 285.)

Criminal Law—Confession While in Custody not Inadmissible.

42. The fact that defendant's confession was made when he was in the custody of officers does not render the confession any the less admissible, it not having been induced by such custody. (*State v. Stevenson*, 285.)

Criminal Law—Extrajudicial Confession of Defendant Written Out by District Attorney and Signed Admissible.

43. Confession of defendant charged with adultery, written out by the district attorney and given to defendant to read, he signing it in the presence of two witnesses, held admissible as an extrajudicial confession, fully meeting the requirements as to competency. (*State v. Stevenson*, 285.)

Criminal Law—Ruling That Foundation for Impeachment of Witness was Insufficient Held Harmless.

44. Ruling as to insufficiency of foundation for impeachment, if error, was harmless, where the testimony sought to be impeached related to an immaterial matter. (*State v. Steidel*, 681.)

Criminal Law—Witnesses—Cross-examination of Defendant not Reversible Error in View of Defendant's Direct Testimony.

45. Where defendant charged with assault and battery testified on direct examination that he was a landscape gardener by occupa-

tion, cross-examination as to how much of his time was devoted to work as secretary of the Labor Socialist party, *held* not ground for reversal, being proper cross-examination of defendant's direct testimony as to his occupation was proper, and being invited error, of which he cannot complain on appeal, if such direct testimony was improper. (*State v. Steidel*, 681.)

CROPS.

See Chattel Mortgages, 1, 2.

See Landlord and Tenant, 11-15.

CROSS-EXAMINATION.

See Criminal Law, 4.

May Show Hostility of Witness.

See Witnesses, 3.

Redirect Examination of Character Witness as to Defendant's Violation of Law Held Proper.

See Witnesses, 4.

As to Defendant Being Charged With Theft, Held Proper.

See Witnesses, 5.

CRUEL AND INHUMAN TREATMENT.

Evidence Insufficient to Show Cruel and Inhuman Treatment.

See Divorce, 1.

Where Wife is Cruelly Treated She is Entitled to a Divorce as a Matter of Right.

See Divorce, 5.

CURATIVE AMENDMENT.

See Constitutional Law, 4.

DAMAGES.

Damages—Lost Profits must be Proved by Definite Data.

1. Where loss of profits from breach of contract is sought to be recovered, such probable profits must be established by proof of data from which the extent of the profit, if any, may be ascertained. (*Johnson v. Homestead-Iron Dykes Mines Co.*, 318.)

Buyer of Stock Entitled Either to Rescind or Counterclaim for Damages.

See Corporations, 2.

Measure of Damages for Breach of Covenant Against Encumbrance.

See Covenants, 3.

Where No Damages for Occupation Before Payment are Shown, Only Nominal Damages can be Recovered.

See Eminent Domain.

Whether Failure to Object to Condemning Corporation's Taking Land Without Paying Award Amounted to a License Held not Material Where No Damages are Shown.

See Eminent Domain, 5.

Lessor Liable for Failure to Put Lessee in Possession.

See Landlord and Tenant, 5.

Lessee's Contract With Lessor's Grantee, Stipulating Damages, not Binding on Lessor.

See Landlord and Tenant, 6.

DECLARATIONS.

Of Deceased's Employee not Binding on Deceased.

See Criminal Law, 3.

DEEDS.

Deeds—Principal and Agent—Evidence Held not to Prove Agency to Take Deed in Satisfaction of Mortgage, or That Deed was Ratified or Accepted.

1. In an action to foreclose a crop mortgage, where mortgagor claimed that mortgage had been satisfied by conveyance to mortgagee, of land on which crops had been grown, evidence held not to prove that third person who received blank deed from mortgagor and inserted mortgagee's name therein was mortgagee's agent, or that mortgagee accepted, ratified or approved the deed. (Wilson v. North Powder Milling Co., 364.)

Deeds—Contract Provisions as to Covenants Connected With Title or Possession Merged in Deed.

2. The deed given in execution of a contract for the sale of land and accepted as such governs the rights of the parties as to any inconsistent covenant connected with the title, possession, quantity or emblements of the land, though it does not supplant collateral and independent covenants. (Winn v. Taylor, 556.)

Deeds—Contract Merged in Deed.

3. Generally, a contract to convey land is merged in a deed executed in performance thereof, and the deed operates as a satisfaction and discharge of the executory contract. (Blake-McFall Co. v. Wilson, 626.)

See Covenants, 1-7.

Oral Agreement Pleaded as Part Consideration for Deed Inadmissible.

See Evidence, 4.

Right to Use Irrigation Ditch Reserved in Deed.

See Evidence, 5.

Deed Conveys Fixtures Notwithstanding Parol Exception.

See Evidence, 15.

Effect of Statement in Complaint of Legal Effect of and Also Copy of Deed as an Exhibit in Haec Verba.

See Pleading, 7.

Warranty Deed Implies Usual Covenants of Warranty.

See Vendor and Purchaser, 3.

DEFECT OF PARTIES.

A General Demurrer Could not Reach Defect of Parties not Affecting Cause as a Whole.

See Appeal and Error, 30.

DELINQUENCY OF MINOR.

Indictment Insufficient to Charge Offense of Contributing to Delinquency of Minor.

See Infants, 1.

DEMURRER.

A General Demurrer Could not Reach Defect of Parties not Affecting Cause as a Whole.

See Appeal and Error, 30.

Complaint Construed Most Strongly Against Pleader on Demurrer.

See Pleading, 8.

Demurrer Admits Truth of Facts Well Plead.

See Pleading, 9.

DISCRETIONARY.

A Decree of Divorce is not Discretionary, but a Matter of Legal Right.

See Divorce, 4.

DISCRETION OF COURT.

Where Trial Court Erroneously Held It had No Discretion to Grant New Trial, Denial will not be Upheld.

See Criminal Law, 27.

Denial of Motion for New Trial for Newly Discovered Evidence, Disturbed Only When There is an Abuse of Discretion.

See Criminal Law, 36.

DITCH.

Owner may Alienate the Ditch and Retain the Water.

See Waters, 4.

Owner Conveying Ditch may Recover Damages for Its Destruction.

See Waters, 5.

Ditch can be Conveyed Separate from Waters Carried Therein.

See Waters, 6.

Reservation of Water Right from Ditch Conveyance Held not to Include Right to Carriage of Waters.

See Waters, 7.

Irrigation District Contract Held not to Prevent Destruction of Existing Ditch.

See Waters, 8.

DIVORCE.

Divorce—Evidence Insufficient to Show Cruel and Inhuman Treatment.

1. In a husband's action for divorce, evidence held insufficient to show that the wife was guilty of cruel and inhuman treatment; it not appearing that she was so neglectful of her household duties as to be cruel, or that her boasts as to her previous admirers, which were in line with her husband's boasts, amounted to cruelty. (Bunnell v. Bunnell, 113.)

Divorce—Tried De Novo on Appeal.

2. On appeal from a decree denying a divorce, the cause must be tried *de novo*. (Cox v. Cox, 148.)

Divorce—Findings of Trial Judge Given Much Weight.

3. In an action for divorce where the record contains irreconcilable contradictions in the evidence upon all material points, much weight will be given to the findings of the trial judge. (Cox v. Cox, 148.)

Divorce—Not Discretionary, but Matter of Right.

4. A decree of divorce should be granted or withheld from the plaintiff as a matter of legal right, and not as a matter of grace. (Cox v. Cox, 148.)

Divorce—Wife Cruelly Treated Entitled to Divorce.

5. Where husband beats and chokes his wife and applies vile names to her, she is entitled to a divorce as a matter of legal right. (Cox v. Cox, 148.)

Divorce—Evidence not Showing Cruelty.

6. Evidence held not to establish husband's cruelty. (Cox v. Cox, 148.)

Divorce—Findings of Trial Court Held of Great Weight.

7. In an action for divorce, where there was a great mass of testimony and much of the credibility of the witnesses depended upon their conduct and appearance on the stand, the findings of the trial court, who saw and heard the witnesses testifying, are entitled to much consideration. (Baird v. Baird, 169.)

Divorce—Statute Giving Successful Party One Third of Other's Property is Imperative.

8. Section 511, L. O. L., providing that the party securing a divorce shall be entitled to one third of the real estate then owned by the other is imperative, and a wife securing a divorce from

her husband must be given an undivided one-third interest in property standing in his name, regardless of the property owned by her. (*Baird v. Baird*, 169.)

Divorce—Statute Giving Interest in Property Does not Apply to Land Outside State.

9. Section 511, L. O. L., entitling the party securing a divorce to one third of the real estate owned by the other does not apply to land outside of the state, which cannot be affected by the decree of the court. (*Baird v. Baird*, 169.)

Divorce—Matters Held not "Personal Indignities Rendering Life Burdensome."

10. Neglect of home premises, failure to supply literature, complaints of expense of dinner parties, and the like, do not amount to "personal indignities rendering life burdensome" within the meaning of the divorce statute. (*Bowers v. Bowers*, 548.)

Divorce—Not Granted for Mere Incompatibility.

11. Under the statute as to indignities, annulment of marriage relation is not to be granted for mere incompatibility of temper or uncongenial disposition, but the conduct of the offending spouse must be such as to threaten personal or mental injury to the one complaining, rendering it unsafe for the latter if the marriage relation is continued. (*Bowers v. Bowers*, 548.)

Divorce—Allegations as to Adultery must be Supported by More Than Mere Innuendo or Suspicion.

12. An allegation as to adultery of spouse in an action for divorce must be supported by more than mere innuendo or suspicion. (*Bowers v. Bowers*, 548.)

Divorce—Denial of on Ground of Loathsome Disease Held Proper.

13. In an action for divorce on the ground of defendant's syphilis, held, that the court properly denied relief under the evidence. (*Bowers v. Bowers*, 548.)

A Divorce Decree may be Affirmed Without Prejudice to Another Suit.

See Appeal and Error, 3.

DOWER.

Dower—Statute, Attempting to Confer Exclusive Jurisdiction on County Court for Admeasurement of Dower Irrespective of Dispute, Ineffective.

1. Despite Article VII, Section 12, of the Constitution, as amended in 1910, giving the County Court the jurisdiction pertaining to probate courts, Oregon Laws, Section 936, subdivision 8, in so far as attempting to confer exclusive jurisdiction on the County Court in all cases of admeasurement of dower, irrespective of any dispute as to the widow's right, is ineffective for such purpose, and a County Court in which a widow sought admeasurement of her dower erred in proceeding with the admeasurement after it appeared from the answer of the heirs that a dispute existed as to her right, and that the answer presented a question of fact. (*Cole v. Marvin*, 175.)

ELECTION OF REMEDIES.

Denial of Motion to Elect Held not Reviewable Error Under Statute.

See Appeal and Error, 14.

Facts Stated in Complaint Assumed True on Motion to Elect.

See Pleading, 4.

Election not Compellable Unless Duplicate Recovery Possible.

See Pleading, 5.

ELEVATOR.

Freight Elevator Held a Fixture.

See Fixtures, 3.

Elevator Excepted from Conveyance by Contract Did not Pass by Subsequent Deed Containing No Exception.

See Fixtures, 6.

Parties can Agree That a Chattel Elevator shall Retain Its Character as Personalty.

See Fixtures, 7.

Grantee Conveying to Third Party Without Excepting Elevator to Which Grantor had Retained Title, Liable to Grantor for Conversion.

See Fixtures, 8.

EMINENT DOMAIN.

Eminent Domain—Use of Highway Illegally Encroaching on Plaintiff's Land Enjoined, Though Land was of Little Value.

1. Where the course of a highway was illegally changed so as to encroach on plaintiff's land, his constitutional rights were invaded, and an injunction to restrain the use of the highway as so changed will be issued, though the land was of little value. (Myers v. Clackamas County, 391.)

Eminent Domain—Where No Damages for Occupation Before Payment are Shown, Only Nominal Damages can be had.

2. In an action against a railroad company for ejectment and damages for taking possession of land after condemnation and before payment of damages assessed, where there was no evidence of damage by reason of defendant's occupation, even if wrongful, plaintiff could recover only nominal damages, and the fact that money for the condemned land was subsequently paid to mortgagee under court order is immaterial. (Sanders v. Portland & O. C. Ry. Co., 620.)

Eminent Domain—Judgment Fixing Price Does not Authorize Condemning Party to Take Possession Without Payment.

3. A judgment fixing the value of land does not authorize the party condemning to take possession without paying the ascertained value into court as required by law. (Sanders v. Portland & O. C. Ry. Co., 620.)

Eminent Domain—Owner's Appeal from Condemnation Judgment Does not Dispense With Necessity of Payment Before Taking Land.

4. The owner's prompt appeal from a preliminary judgment assessing damages did not dispense with the necessity of the condemning railway company's paying the damages assessed; for although Section 7104, Or. L., provides that such appeal shall not prevent the corporation from using the land, yet the compensation must be first assessed and tendered as required by Article I, Section 18, of the Constitution. (*Sanders v. Portland & O. C. Ry. Co.*, 620.)

Eminent Domain—Whether Failure to Object to Condemning Corporation's Taking Land Without Paying Award Amounted to a License Held not Material Where no Damages Shown.

5. Whether owner's failure to object to condemning corporation's taking immediate possession of the land and constructing railroad thereon amounted under the circumstances to a license was not material in an action by the owners where no damages were shown, particularly where owners received interest on the original assessment to which they were not morally and legally entitled, and the delay was caused partly by their groundless appeal. (*Sanders v. Portland & O. C. Ry. Co.*, 620.)

Eminent Domain—Delay Held Insufficient to Show Abandonment of Proceedings.

6. Where a railroad company had land condemned, and the owner immediately appealed, and pending appeal the company constructed its railroad thereon, its delay in entering the mandate on appeal for a period of nine months and in payment of condemnation money held not to show abandonment by the company of proceedings in which the owner's appeal was groundless. (*Sanders v. Portland & O. C. Ry. Co.*, 620.)

EQUITABLE OWNER.

One not Actually Receiving Stock Held Equitable Owner and Liable to Creditors.

See Corporations, 8.

EQUITY.

Equity Alone can Reform Attornment Agreement to Restrict Release of Original Landlord.

See Reformation of Instruments, 2.

EVIDENCE.

Evidence—Agency Held Sufficiently Shown to Admit Conversation With Principal.

1. In an action for the possession of sheep owned by a third person, evidence held to establish plaintiff's agency for such person sufficiently to justify admission of a conversation between defendant and the third person. (*La Follett v. Jones*, 136.)

Evidence—Fact That Mortgage Pertained to Firm Matters may be Proved by Testimony.

2. In a suit to foreclose a chattel mortgage of firm property, signed by only one partner in his individual name, the fact that the mortgage and other writings signed by that partner in his own name pertained to partnership matters was properly established by testimony. (*Aramburn v. Guerricagoitia*, 259.)

Evidence—Words Varying Indorser's Liability must Appear on the Instrument Itself.

3. Under Sections 7855, 7856, Or. L., words varying the liability of one placing his name on the back of a negotiable instrument from that of a mere indorser must appear on the instrument itself as part of the indorsement, for not only is this so required by statute, but promissory notes being in a sense accepted as current money by merchants should carry a full statement of all of their conditions. (*First Nat. Bank v. Bach*, 332.)

Evidence—Deed—Oral Agreement—Contractual Consideration.

4. Under Section 713, L. O. L., an alleged oral agreement pleaded as part of the consideration for a deed, and hence a contractual consideration, and not one of a monetary nature, is inadmissible to vary or add to the deed. (*O'Neil v. Twohy Bros. Co.*, 481.)

Evidence—Irrigation—Ditch—Right to Use Reserved in Deed.

5. Where an owner of a water right by deed conveyed his interest in the ditch to an irrigation district and retained his water right, he could not thereafter contradict his conveyance by parol, so as to claim the right to use of the ditch as the only means by which his water rights reserved in the deed could be enjoyed. (*O'Neil v. Twohy Bros. Co.*, 481.)

Evidence—Greater Number of Witnesses is of Weight, but not Conclusive.

6. In determining the issue of fraudulent representations in the sale of land, the fact that the greater number of witnesses denied the fraud, though not conclusive, is an element in determining the truth. (*White v. Harrison*, 508.)

Evidence—Parol Evidence Rule One of Substantive Law.

7. Section 713, Or. L., making evidence of an agreement other than the contents of the writing to which it was reduced by the parties inadmissible with certain exceptions, and Section 798, creating a presumption of the truth of facts recited in a written instrument as against the parties to the instrument, embody a well-established rule of common law, which is one not of evidence merely, but of substantive law. (*Marks v. Twohy Bros. Co.*, 514.)

Evidence—Parol Evidence Rule Does not Apply to Receipts.

8. As a general rule, the exclusion of parol or extrinsic evidence to contradict written instruments does not apply to mere receipts, or writings which are in the nature of receipts, which may be contradicted, varied or explained. (*Marks v. Twohy Bros. Co.*, 514.)

Evidence—Recital of Payment may be Contradicted or Varied.

9. A recital in a written instrument as to the payment of the consideration is in the nature of a receipt, and may be contra-

dicted or explained by parol or extrinsic evidence, unless such contradiction would defeat some substantial and contractual provision of a valid written instrument. (*Marks v. Twohy Bros. Co.*, 514.)

Evidence—Contradicting Consideration Clause Inadmissible if It Defeats Deed.

10. Parol evidence, offered to contradict the consideration clause of a conveyance, which, in effect, defeats the operation of the conveyance or lessens its effect, or incorporates therein a reservation not enumerated in the conveyance, is inadmissible. (*Marks v. Twohy Bros. Co.*, 514.)

Evidence—Parol Evidence Inadmissible to Show Contractual Consideration for Conveyance of Ditch.

11. Parol evidence that the parties to a conveyance of a ditch, which expressly reserved therefrom the water right which had flowed through the ditch, agreed as part of the consideration that the grantee should maintain the ditch fit for conveyance of the waters reserved, adds a contractual consideration to the moneyed consideration stated in the deed, which nullifies the rights to the ditch conveyed, and is therefore inadmissible. (*Marks v. Twohy Bros. Co.*, 514.)

Evidence—Contractual Consideration cannot be Added to Money Consideration.

12. A purely money consideration mentioned in a written instrument which is complete on its face cannot be amplified by parol evidence so as to ingraft into the instrument an additional executory or contractual consideration, which would impose on one of the parties an affirmative obligation, of which there is no indication or suggestion in the writing. (*Marks v. Twohy Bros. Co.*, 514.)

Evidence—Parol Evidence Admissible to Show Want or Failure of Consideration.

13. Parol evidence to show an entire absence or a partial or total failure of consideration is not within the rule excluding such evidence to vary or contradict the terms of a written instrument. (*Marks v. Twohy Bros. Co.*, 514.)

Evidence—Presumption That Clerk Issuing Execution Performed Duty Held not Overcome by Testimony.

14. The presumption that a clerk issuing an execution did so regularly at request of plaintiff, and not defendant's counsel, held not overcome by such clerk's testimony a few years afterwards that the best of her recollection was that she issued it at request of defendant's counsel. (*Crim v. Thompson*, 599.)

Evidence—Deed Conveys Fixture Notwithstanding Parol Exception.

15. A conveyance of real estate will pass the fixtures thereto annexed if there is no exception in the deed of conveyance, notwithstanding a parol exception at the time of the sale, since to give effect to such parol agreement would vary the terms of a written deed. (*Blake-McFall Co. v. Wilson*, 626.)

See Animals, 2.

See Criminal Law, 6, 7, 10, 23-26, 28-31, 33-36.

See Homicide, 1-19.

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- See Specific Performance, 1-3.
 - See Vendor and Purchaser, 2.
 - See Witnesses, 1-5.
 - Identity of Policeman to Whom Defendant Gave Pistol Previously Taken from a Policeman, Held Immaterial.**
See Assault and Battery, 1.
 - Defendant Entitled to Submission of Self-defense Issue in View of Evidence.**
See Assault and Battery, 2.
 - Defendant may Prove Self-defense Under Plea of not Guilty.**
See Assault and Battery, 3.
 - Evidence Held not to Show That Attorney Converted Client's Funds to Other Uses.**
See Attorney and Client, 1.
 - Evidence Held to Show Corporation Stock to be Unpaid for.**
See Corporations, 6.
 - Admission of Evidence of Experiments or Demonstrations not an Abuse of Discretion.**
See Criminal Law, 1, 2.
 - A Conversation Five Days Before Killing not Admissible as Res Gestae.**
See Criminal Law, 5.
 - Required to Prove Charge Merely Beyond Reasonable Doubt.**
See Criminal Law, 8.
 - Exclusion of Evidence not Considered in Absence of Answer and Specification in Brief.**
See Criminal Law, 11.
 - Evidence of Prior Identification of Defendant, Inadmissible as Self-serving Declaration.**
See Criminal Law, 28.
 - Evidence as to Identification of Prosecuting Witness, not Rebuttal.**
See Criminal Law, 30.
 - Sufficiency of Evidence Reviewed Where Motion for Nonsuit or Directed Verdict is Made.**
See Criminal Law, 34.
 - Cross-examination of Defendant as to His Being Secretary of the Labor Socialist Party, not Reversible Error, in View of His Direct Testimony.**
See Criminal Law, 45.
 - Insufficient to Show Cruel and Inhuman Treatment.**
See Divorce, 1.

Held not to Establish Husband's Cruelty.

See Divorce, 6.

Of Conversation of Deceased With Defendant's Employees, Inadmissible.

See Homicide, 1.

Sufficient to Sustain Conviction of Two Defendants for Manslaughter.

See Homicide, 1.

As to Ownership of Land on Which Homicide Took Place, Inadmissible.

See Homicide, 2.

That Deceased Became Angry on Day Previous to Killing, Because of Inability to Lease Land, Inadmissible.

See Homicide, 3.

Turning of Bucks into Flock of Sheep not a Felony Justifying Homicide.

See Homicide, 4.

As to Reputation of Deceased, Competent.

See Homicide, 5.

Held to Make Self-defense a Question for the Jury.

See Homicide, 16.

That Body Could have Been Moved Without Leaving Footprints Held Admissible.

See Homicide, 17.

Insufficient to Show Agreement to Pay Percentage of Profits for Services.

See Master and Servant, 5.

Evidence of Defendant's Protestation of Innocence Inadmissible as Showing Identification.

See Robbery, 1.

Held to Show Inventory of Stock in Store Properly Taken.

See Specific Performance, 4.

Held not to Sustain Defendant's Contention of Fraud.

See Specific Performance, 5.

EXCEPTIONS, BILL OF.

In Absence of Bill of Exceptions in Record, Case Comes to Appellate Court on the Complaint and Findings.

See Appeal and Error, 4.

Unreasonable Delay in Filing Bill of Exceptions, No Excuse for Failure to File Abstract.

See Appeal and Error, 7.

EXECUTORS AND ADMINISTRATORS.**Executors and Administrators—Evidence of Payment Insufficient to Rebut a Presumption of Ownership from Possession.**

1. In a proceeding against the estate of a deceased, based on a note in the possession of claimant at the time of the death of the maker, and of which he was the original payee, evidence of payment *held* wholly insufficient to rebut the statutory presumption of ownership, so that the denial of the claim was improper. (*Johnston v. Apple*, 278.)

Executors and Administrators—Complaint Held to State Capacity to Sue as Executor.

2. In an action by an executor, allegations that the deceased died testate, that prior to commencement of action plaintiff was "duly and legally appointed executor" of her estate, and that after specified date "has been and now is the duly appointed and qualified and acting executor" of her estate, *held* sufficient on demurrer to plead capacity to sue as executor; the reasonable inference being that he was appointed executor by a court of competent jurisdiction, had qualified under such appointment, and had entered upon the discharge of his duties. (*Marshall v. Marshall*, 500.)

FEDERAL LIABILITY ACT.**Exclusive as to Injuries Growing Out of Handling Interstate Commerce.**

See Commerce, 1.

FINDINGS.**Findings of Trial Judge Given Much Weight in Appellate Court.**

See Appeal and Error, 11.

See Divorce, 3, 7.

Findings on Conflicting Evidence not Disturbed.

See Appeal and Error, 12.

Findings in Equity as to Fraud are of Influence, but not Controlling.

See Appeal and Error, 25.

Findings must be Responsive to Issues.

See Trial, 1.

FISH.**Fish—Catching in the Sea Beyond Three-mile Limit and "Outside" of River Means Between Lines Drawn from Headlands.**

1. Laws of 1919, page 653, Section 5, prohibiting the sale or possession of salmon taken beyond the three-mile line outside of the Columbia River during the closed season for that river, means fish taken beyond that line between lines drawn from the north and south headlands at the mouth of the river, which construction gives the word "outside" its ordinary meaning of to the exterior of, without, outward from, is definite and certain, and does not

lead to absurd results, since the distance between the headlands is seven miles, so that that section does not apply to all fish caught anywhere by fishermen using landing places along the Columbia River as their base. (Union Fishermen's Co. v. Shoemaker, 659.)

Fish—Game—Protection of Fish and Game is Within Police Power.

2. The preservation of fish and game has always been considered to be within the proper domain of the police power. (Union Fishermen's Co. v. Shoemaker, 659.)

Fish—Prohibiting Sale of Fish Caught During Closed Season not Unreasonable.

3. In view of the habits of salmon fish to run in different rivers at different times, so that the closed season to protect them during part of the run must be different for different rivers, Laws of 1919, page 653, Section 5, which prohibits the sale or possession of salmon caught beyond the three-mile limit outside a certain river during the closed season for that river, is not an unreasonable police regulation, because it is unusual, since prohibition of sales of fish and game during the closed season are usual, and the only unusual features of the statute are necessitated by the unusual conditions. (Union Fishermen's Co. v. Shoemaker, 659.)

Fish—Can Prohibit Sale of Fish Caught Outside Three-mile Limit.

4. Though a state could not make unlawful the catching of fish beyond the three-mile limit, Laws of 1919, page 653, Section 5, which merely prohibits within the state the sale or possession of fish caught outside such limits, is within the power of the state to make effective its prohibition against taking fish during the closed season from waters over which it has jurisdiction. (Union Fishermen's Co. v. Shoemaker, 659.)

Fish—Right to Sell in Other States Does not Invalidate Prohibition.

5. Laws of 1919, page 653, Section 5, prohibiting sale or possession within the state of fish caught beyond the three-mile limit outside the Columbia River, is not invalid as an unreasonable police regulation, which fails to accomplish its purpose because the State of Washington has no similar statute, so that fish caught within such limits may be sold in that state, and thereby the purpose of the Oregon statute is partially defeated. (Union Fishermen's Co. v. Shoemaker, 659.)

Prohibition of Sale of Fish Caught Outside Limits not Regulation of Foreign or Interstate Commerce.

See Commerce, 2.

Prohibition of Sale of Fish Caught Outside Limits During Closed Season, Held not to Violate Agreement With Other State.

See States, 1.

Regulating Fishing in Particular Streams not Discriminatory.

See Statutes, 5.

FIXTURES.

Fixtures—Building not a Part of Realty, if Agreed It may be Removed.

1. Where a building is created on the land of another, it is *prima facie* a part of the realty; but if erected with the under-

standing, express or implied, that it may be removed when desired, it is then not a part of the real estate, but personal property. (*Dippold v. Cathlamet Timber Co.*, 183.)

Fixtures—Annexation, Adaptation and Intention, the Three Tests to be Applied.

2. Ascertainment of whether personalty has been transferred into realty requires the united application of three tests: Annexation, adaptation and intention. (*Blake-McFall Co. v. Wilson*, 626.)

Fixtures—Freight Elevator Held a Fixture.

3. Freight elevator bolted and attached to building and installed in the manner that freight elevators are usually installed by owners for the sole purpose of serving the building with the intention to take the elevator with them if they ever moved but without a definite intention to move at the time of its installation, *held* a fixture in suit against purchaser. (*Blake-McFall Co. v. Wilson*, 626.)

Fixture—Considerations, in Ascertaining Intention of Party Making Annexation, Stated.

4. The intention of the party making the annexation as to whether the personalty affixed is to constitute a fixture is to be inferred from the nature of the article affixed, the relation and situation of the party making the annexation, the construction and mode of annexation, and the purposes and use for which the annexation has been made. (*Blake-McFall Co. v. Wilson*, 626.)

Fixtures—More Liberal Rule Applied When Annexation is by Tenant Than When Made by Owner.

5. In ascertaining intention of party who made annexation, a more liberal rule is applied when the annexation is made by a tenant than when made by the owner, and an article annexed to the land may be regarded as a trade or domestic fixture, and therefore as personalty, if annexed by a tenant, but may be treated as realty if annexed by the owner. (*Blake-McFall Co. v. Wilson*, 626.)

Fixtures—Elevator Excepted from Conveyance by Contract Did not Pass by Subsequent Deed Containing No Exception.

6. Deed did not pass title to freight elevator, though there was no exception stated, where contract executed prior to conveyance excepted the elevator, since such contract operated, as between the parties, to reimpress the elevator with the character of personalty. (*Blake-McFall Co. v. Wilson*, 626.)

Fixtures—Parties can Agree That a Chattel shall Retain Its Character as Personalty.

7. Parties can agree that a chattel shall continue to retain its character as personalty, and, though attached in such manner that without such agreement it would lose its character as a chattel, the agreement will be given effect, as between the parties at least, and the chattel will be deemed to retain its character as personalty, if it can be removed without material injury to the article itself or to the freehold. (*Blake-McFall Co. v. Wilson*, 626.)

Fixtures—Grantee Conveying to Third Party Without Excepting Elevator to Which Grantor had Retained Title Liable to Grantor for Conversion.

8. Where deed failed to pass title to elevator by reason of previous contract between the parties reimpressing elevator with the character of personalty, the subsequent conveyance of the building by grantee to third party, who had no knowledge that elevator was not a fixture and that grantee had no title thereto, constituted conversion of elevator by grantee, rendering grantee liable to grantor for value of elevator as it constituted part of the building and not its value as torn down for removal, since the conveyance to innocent third party passed title to the elevator. (Blake-McFall Co. v. Wilson, 626.)

Fixtures—Tenant cannot Remove Fixtures After Expiration of Term.

9. Generally, a term tenant cannot remove fixtures after the expiration of his term, and the landlord becomes the absolute owner on tenant's surrender of premises without removal of fixtures, since tenant by failing to remove fixtures abandons the right to so do. (Blake-McFall Co. v. Wilson, 626.)

Fixtures—Tenant's Right of Removal not Abandoned Where He Continues in Possession Under New Lease.

10. The rule that a tenant is required to remove fixtures before expiration of his term or abandon the right to removal does not apply where the lease is renewed for a new term, and the new lease does not per se extinguish the right of the tenant to remove fixtures installed by him under immediately preceding lease. (Blake-McFall Co. v. Wilson, 626.)

Deed Conveys Fixtures Notwithstanding Parol Exception.

See Evidence, 15.

FOOTPRINTS.

See Homicide, 17.

FORCIBLE ENTRY AND DETAINER.

Judgment Against Tenant Precludes Recovery in Subsequent Action for Seed and Work in Planting Crops.

See Judgment, 5.

. FORECLOSURE.

See Chattel Mortgages, 1, 2.

See Evidence, 1.

See Mortgages, 1.

See Partnership, 3.

FRAUD.

Fraud—Necessary Averments Stated.

1. A pleading alleging fraud must state that the representations were false, setting out what the truth was so that the court may draw the conclusion of falsity, that the one making them knew they were false or made them recklessly, that they were made with

intent to defraud, and that the party seeking relief relied on the false statements and was thereby deceived. (*Obermeier v. Mattison*, 195.)

Findings in Equity as to Fraud are of Influence, but not Controlling,
See Appeal and Error, 25.

Agreement Between Purchaser of Land and Tenant Induced by Fraud, No Obstacle to Enforcement of Original Lease by Tenant.
See Landlord and Tenant, 9.

Tenant not Entitled to Destroy and Also Enforce Fraudulently Procured Agreement of Attornment.
See Landlord and Tenant, 10.

Complaint After Verdict Held to Plead Fraudulent Misrepresentations.
See Pleading, 3.

Must Allege That Mistake was Mutual or Originated in Fraud.
See Reformation of Instruments, 1.

Burden of Proving Fraud by Vendor Rests on Purchaser.
See Vendor and Purchaser, 1, 2.

FRAUDULENT CONVEYANCES.

See Appeal and Error, 32.

GAME.

Protection of Fish and Game is Within Police Power.
See Fish, 2.

GOOD FAITH.

See Compromise and Settlement, 1.

GOODWILL.

Influence and Goodwill in Promoting Construction of Railroad not a Valid Consideration for Stock.
See Corporations, 7.

HARMLESS ERROR.

See Appeal and Error, 27.

HIGHWAYS.

Highways—Order Establishing Road cannot be Informally Changed to Conform to Petition.

1. Where the County Court formally entered an order opening a highway as established by the surveyor, which was on a line different from that designated in the petition, the highway cannot thereafter be changed to conform to the line in the petition by a

mere verbal order of the county judge made without any notice or citation. (*Myers v. Clackamas County*, 391.)

Use of Highway Illegally Encroaching on Plaintiff's Land may be Restrained.

See Eminent Domain, 1.

HOMICIDE.

Homicide—Testimony of Conversation of Deceased With Defendant's Employee Held Inadmissible.

1. In homicide prosecution, testimony by an employee of deceased as to a conversation between deceased and an employee of defendants relating to negotiations about employment of defendant's employee by deceased, *held inadmissible*. (*State v. Holbrook*, 43.)

Homicide—Testimony as to Ownership of Land on Which Homicide Took Place Held Inadmissible.

2. In prosecution for homicide, committed following a dispute as to the right to use land for grazing purposes, testimony of an abstractor as to ownership of lands by one of the defendants *held inadmissible*, particularly in view of concession by state that land was owned by one of the defendants. (*State v. Holbrook*, 43.)

Homicide—That Deceased Became Angry on Day Previous to Killing, Because of Inability to Lease Land, Inadmissible.

3. In prosecution for homicide, committed following a dispute as to use of land for grazing purposes, testimony as to appearance of anger on part of deceased on the day previous to the homicide, when he learned that he would be unable to lease land because of owner having sold it, *held inadmissible*. (*State v. Holbrook*, 43.)

Homicide—Turning of Bucks into Flock of Sheep not a Felony, Justifying Homicide.

4. In prosecution for homicide, committed after dispute as to use of land for grazing purposes, testimony as to the effect of turning a band of bucks into defendants' flock of sheep *held inadmissible*, since, even if deceased had been in the act of so doing, it would not have been a felony on defendant's property, justifying homicide. (*State v. Holbrook*, 43.)

Homicide—Evidence as to Deceased's Reputation Held Competent.

5. In homicide prosecution, evidence that deceased's general reputation was that of a peaceable, law-abiding citizen *held competent*, to refute assertion that he was about to commit a lawless act at the time of the killing. (*State v. Holbrook*, 43.)

Homicide—Instructions on Apparent Danger Held Favorable to Defendants.

6. In homicide prosecution, defended on ground of self-defense, instructions on apparent danger *held favorable* to defendant. (*State v. Holbrook*, 43.)

Homicide—Apparent Danger must be Considered from the Standpoint of a Reasonable Man.

7. The question of apparent danger must be considered from the standpoint of a reasonable man in the plight of the defendants

at the time of the killing, under all the conditions then surrounding the parties as disclosed by the testimony. (State v. Holbrook, 43.)

Homicide—Instruction Requiring Apparent Danger to be Absolutely Established Held not Objectionable.

8. In homicide prosecution, instruction that apparent danger must be danger so urgent that the killing is "absolutely or apparently absolutely, necessary," *held* not objectionable as against contention that it required the danger to be mathematically established. (State v. Holbrook, 43.)

Homicide—Defendant, Claiming Self-defense, Required Merely to Raise a Reasonable Doubt.

9. In prosecution for homicide, where defense was that there was either actual or absolute danger, or the reasonable appearance of such danger against which defendant acted in self-defense, he was not required to prove such defense to a mathematical certainty, but merely to raise a reasonable doubt of his guilt in the minds of the jurors. (State v. Holbrook, 43.)

Homicide—No Accessory Before Fact in Case of Manslaughter Committed in Heat of Passion.

10. There can be no accessory before the fact in a case of manslaughter by one acting on a sudden heat of passion, though more than one person may be actuated at the same time by a sudden heat of passion caused by a provocation applicable to all of them, apparently sufficient to make the passion irresistible, so that both will be guilty of manslaughter. (State v. Holbrook, 43.)

Homicide—Evidence Sufficient to Sustain Conviction of Two Defendants for Manslaughter.

11. In homicide prosecution, *held*, on appeal from conviction of two defendants for manslaughter, that the evidence was sufficient to warrant jury in concluding that both defendants had been actuated by a sudden heat of passion and had fired at deceased at the same time. (State v. Holbrook, 43.)

Homicide—Instruction on Justifiable Homicide Held Proper.

12. In prosecution for homicide, committed as the result of a dispute concerning use of land for grazing of sheep, the giving of an instruction that homicide is justifiable when committed to prevent the commission of a felony on the property of person who does killing, or on property in his possession, or in any dwelling-house where such person may be, *held* proper under the evidence. (State v. Holbrook, 43.)

Homicide—Instruction on Justifiable Homicide Held Harmless.

13. In prosecution for homicide, committed as the result of a dispute concerning use of land for grazing of sheep, instruction that homicide is justifiable when committed to prevent commission of a felony on property of person who does killing, or on property in his possession, or in any dwelling-house where such person may be, if error, *held* not ground for reversal on defendants' appeal, being favorable to defendants. (State v. Holbrook, 43.)

Homicide—Whether Defendant had Fired Shot, or Been Mere Bystander, Held for Jury.

14. In a homicide prosecution, involving the issue of whether defendant had been a mere bystander, or had fired one of the shots that had struck deceased, evidence *held* sufficient for submission to the jury of the guilt or innocence of such defendant. (State v. Holbrook, 43.)

Homicide—Defendant Guilty of Manslaughter, Though Shot was not Necessarily Fatal.

15. A defendant who fired one of the shots that struck deceased, is guilty of manslaughter, under Sections 1897, 1902, L. O. L., where such shot contributed to deceased's death, though the shot was not necessarily fatal, and though the shot fired by other defendant was necessarily fatal. (State v. Holbrook, 43.)

Homicide—Evidence Held to Make Self-defense a Question for the Jury.

16. In a homicide prosecution, involving self-defense issue, evidence *held* sufficient for submission to the jury. (State v. Holbrook, 43.)

Homicide—Evidence That Body Could have Been Moved Without Leaving Footprints Held Admissible.

17. In homicide prosecution where it was claimed that defendants had moved decedent's body subsequent to his death, but there were no footprints surrounding the body, where it lay when the officers arrived, evidence that the body could have been moved without leaving such footprints *held* admissible. (State v. Holbrook, 43.)

Homicide—Decedent's Peaceableness Admissible, Where Character Assailed.

18. The state cannot, as a part of its primary case, offer evidence concerning decedent's reputation as a peaceable and quiet person, but generally can offer such evidence in rebuttal, if decedent's character for peaceableness is assailed by the accused. (State v. Holbrook, 43.)

Homicide—Where Self-defense is Pleaded, State may Show Decedent's Peaceableness.

19. In a homicide prosecution, the plea of self-defense, with evidence tending to support it, *held* a sufficient attack on decedent's character for peace and quiet to entitle the state to submit rebuttal evidence of his good reputation for peaceableness. (State v. Holbrook, 43.)

See Criminal Law, 1-16.

HUSBAND AND WIFE.

Husband and Wife—Elements Constituting Alienation of Affections Stated.

1. The action for alienation of affections is based on loss of consortium, and loss of service or pecuniary loss is not a necessary element. (Pugsley v. Smyth, 448.)

Husband and Wife—Defendant must have Been Intentional and Controlling Cause of Alienation.

2. Defendant's conduct must have been the intentional cause and the controlling cause of the alienation of affections, although there may have been other contributing causes. (*Pugsley v. Smyth*, 448.)

Husband and Wife—Cause of Action for Alienation not Dependent on Showing Adultery.

3. Physical separation of the spouses is not essential, and it is not necessary that plaintiff prove debauchment, though generally, in the absence of adultery, defendant is not liable unless acting maliciously. (*Pugsley v. Smyth*, 448.)

Husband and Wife—In Action for Alienation Natural Expressions of Wife Showing State of Mind are Admissible, Though Involving Acts and Words of Defendant.

4. The declarations of the deserting wife, though made in the absence of defendant, are available to prove the state of the wife's affections, her motive, and the effect produced upon her by defendant's conduct, notwithstanding such declarations involve statements of acts done or words spoken by the defendant, but such declarations must not be mere narratives but natural expressions of the emotions showing her state of mind. (*Pugsley v. Smyth*, 448.)

Husband and Wife—Wife's Admission to Husband of Past Adultery not Admissible in Alienation Suit.

5. In an action for alienation of wife's affections, the husband's testimony of her admission of past misconduct and adultery with defendant was inadmissible; the utterance not being a part of the act, nor made at or approximately before the alienation, so that it was a mere narrative of past events. (*Pugsley v. Smyth*, 448.)

Husband and Wife—Statement by Wife That Defendant Loved and Intended to Marry Her Admissible in Husband's Alienation Action.

6. In an alienation action, plaintiff's testimony that his wife said defendant had promised to provide her anything she wanted that money would buy, that he was going away to school, that she was going there, etc., was inadmissible as a narrative of fact, while another witness' testimony that plaintiff's wife said she was in love with defendant, who did not care for his own wife and intended to marry her, etc., was admissible as a natural expression of wife's emotion. (*Pugsley v. Smyth*, 448.)

Husband and Wife—Cautionary Instructions as to Wife's Declarations Desirable.

7. In an alienation of affections suit, since evidence of the alienating spouse's declarations is receivable only for a limited purpose, and cannot be considered as evidence that defendant really did the acts or uttered the words attributed to him by such declarations, the court should advise the jury of the limited purpose for which such declarations may be considered; for, in the absence of a cautionary instruction, jurors will naturally assume that such

declarations may be treated as evidence that defendant actually did or said what the alienated spouse said he did or said. (Pugsley v. Smyth, 448.)

For Crime of Adultery, Offended Husband or Wife has Exclusive Privilege to Institute Prosecution.

See Adultery, 1.

Wife's Admission of Adultery Made to Husband is Privileged.

See Witnesses, 6.

IMPEACHMENT.

See Witnesses, 8.

Ending That Foundation for Impeachment of Witness was Insufficient, Held Harmless.

See Criminal Law, 44.

Cross-examination to Impeach by Inconsistent Statements cannot be Justified on Ground That It Shows Bias and Prejudice.

See Criminal Law, 4.

Bad Faith of Prosecuting Officer in Asking Impeaching Question not Presumed.

See Criminal Law, 19.

Must be According to Statutory Method.

See Witnesses, 1.

Inconsistent Statement, Used for Impeachment, must Relate to Testimony of the Witness.

See Witnesses, 2.

INCOMPATIBILITY.

Divorce not Granted for Mere Incompatibility.

See Divorce, 11.

INDICTMENT.

Indictment and Information—Facts to be Alleged in Direct Language Without Uncertainty.

1. Facts constituting the offense must be alleged in direct and positive language, without equivocation or uncertainty. (State v. Holbrook, 43.)

Insufficient to Charge Offense of Contributing to Delinquency of Minor.

See Infants, 1.

INDORSER.

One Placing His Name on the Back of a Note Held an Indorser.

See Bills and Notes, 2.

To Hold Indorser, Presentment must be Shown or Excused.

See Bills and Notes, 3.

Indorser Held not Person Accommodated, and so Presentment and Notice of Dishonor was Necessary.

See Bills and Notes, 4.

INFANTS.

Infants—Indictment Insufficient to Charge Offense of Contributing to Delinquency of Minor.

1. An indictment, charging that defendant did wrongfully contribute to the delinquency of a minor female child, and induced her to have unlawful sexual intercourse with him, she not then and there being his wife, is insufficient where it did not allege that the minor, who was averred to be over the age of 16, was unmarried, for a female minor of the age of 15 or over, if married, cannot be a delinquent child, and the fact that such minor is not married must affirmatively appear. (State v. Gates, 110.)

INFERENCE.

In Appellate Court Every Reasonable Inference Invoked to Support Complaint, not Objected to Below.

See Pleading, 1.

INJUNCTION.

Injunction—Comparative Injury not Considered in Case of Continuing Trespass.

1. The Supreme Court of Oregon is not inclined to apply the rule of comparative injury in determining whether an injunction shall issue in the case of a continuing trespass. (Hansen v. Crouch, 141.)

INSTRUCTIONS.

Error in Instruction Held Cured by Verdict for Defendant on Separate Independent Issue.

See Appeal and Error, 2.

On Circumstantial Evidence Improper, Where There is Direct Evidence of Corpus Delicti.

See Criminal Law, 6.

Instructions to be Directed to All of Legitimate Testimony.

See Criminal Law, 7.

Distance of Witnesses from Scene Does not Make Testimony Circumstantial so as to Require Instructions Thereon.

See Criminal Law, 16.

Court's Attention must be Directed to Failure to Instruct.

See Criminal Law, 20.

On Reasonable Doubt Properly Refused Where Covered by Instructions Given.

See Criminal Law, 21.

Assuming Evidence of Good Character Properly Refused.

See Criminal Law, 22.

On Apparent Danger Held Favorable to Defendants.

See Homicide, 6.

Requiring Apparent Danger to be Absolutely Established not Objectionable.

See Homicide, 8.

On Justifiable Homicide Held Proper.

See Homicide, 12.

On Justifiable Homicide Held Harmless.

See Homicide, 13.

Cautionary Instructions as to Wife's Declarations.

See Husband and Wife, 7.

Requested Instructions to be Tested by Words Used, not by Words Meant to be Used.

See Trial, 3.

Refusal of Instruction Covered by Others not Error.

See Trial, 4.

INTENT.**Intention of Party Making Annexation, Stated.**

See Fixtures, 4.

More Liberal Rule Applied When Annexation is Made by Tenant Than When Made by Owner.

See Fixtures, 5.

Legislative Intent Controls Construction.

See Statutes, 1.

Statute Construed to Ascertain Intention of Legislature.

See Statutes, 3.

If Intent of Legislature not Ascertainable, Reasonable Construction of Statute Adopted.

See Statutes, 4.

INTEREST.**Interest—Judgment Bears Same Interest as Written Contract on Which Founded.**

1. A judgment against a corporation, founded upon a written contract providing for the payment of money with interest at 8 per cent, should bear interest at the same rate. (*Rasor v. West Coast Development Co.*, 581.)

INTERSTATE COMMERCE.**Federal Liability Act Exclusive as to Injuries from Handling Interstate Commerce.**

See Commerce, 1.

Prohibition of Sale of Fish Caught Outside Limits not Regulation of Foreign or Interstate Commerce.

See Commerce, 2.

IRRIGATION.

See Waters, 4, 5.

IRRIGATION DISTRICT.

Authority Giving Contractor Right to Interrupt Flow is a Defense.

See Trespass, 1.

Irrigation District Contract Held not to Prevent Destruction of Existing Ditch.

See Waters, 8.

JUDGMENT.

Judgment—Opinion Looked to, to Determine Matters Concluded.

1. Where there was only a general finding, recourse may be had to the court's opinion to show what was actually decided, relative to the question of the matters as to which the decree is *res judicata*. (United States Nat. Bank v. Shehan, 155.)

Judgment—Conclusive on Matters in Issue.

2. A fact properly in issue, and necessary to the determination of the case, is by the decree on the equities concluded from re-examination in a subsequent suit or action between the parties. (United States Nat. Bank v. Shehan, 155.)

Judgment—Conclusive Irrespective of Form of Action.

3. Relative to a fact in issue, and necessary to the determination of the case, being finally concluded by the decision, as between the parties, it is immaterial that the form of action differs, as that the first is a suit to foreclose a mortgage, and the second an action for money had and received. (United States Nat. Bank v. Shehan, 155.)

Judgment—Proceeding by Writ of Review is a Direct Attack on Decree.

4. A proceeding by a writ of review is a direct, and not a collateral, attack upon the decree sought to be reviewed. (Cole v. Marvin, 175.)

Judgment—Judgment Against Tenant in Forcible Entry and Detainer Precludes Recovery in Subsequent Action for Seed and Work in Planting Crops.

5. Where lessee under farm lease providing for termination of lease prior to expiration of specified term on lessor's conveyance of the premises planted crop prior to termination of lease effected by such conveyance, and was thereafter ousted from possession by judgment in forcible entry and detainer action prior to harvesting of crop, such judgment would be conclusive in lessee's action to recover the value of the seed and labor in planting crops if lessee's right to enter on land and harvest the crops sown could have been set up as a defense in the forcible entry and detainer action, since

one cannot be cast in damages or suffer on account of a judgment regularly rendered in his favor. (*Hostetler v. Eccles*, 355.)

Judgment—Decree Awarding Defendant Attorney a Lien Held Inconsistent With Plaintiff's Allegations of Advances to Defendant.

6. Where a complaint alleged that defendant, while formerly acting as plaintiff's attorney and having in his possession money belonging to plaintiff applicable to the satisfaction of a judgment rendered against her, permitted the judgment to remain and caused or connived at issuance of execution thereon against her land which he purchased at the execution sale, a decree treating the sheriff's deed as a cloud on her title, but awarding the defendant a lien, was inconsistent with the averments of the complaint that defendant had possession of plaintiff's moneys sufficient and applicable to discharge of the judgment. (*Crim v. Thompson*, 599.)

Attorney may Purchase Lands Sold Under Judgment Against His Client After Relation Ended.

See Attorney and Client, 2.

Judgment Fixing Price Does not Authorize Condemning Party to Take Possession Without Payment.

See Eminent Domain, 3.

Owner's Appeal from Condemnation Judgment Does not Dispense With Necessity of Payment Before Taking Land.

See Eminent Domain, 4.

Judgment Bears Same Interest as Written Contract on Which Founded.

See Interest, 1.

Valid Judgment and Sale Thereunder not a Cloud on Title.

See Quieting Title, 2.

JURISDICTION.

Jurisdiction cannot be First Challenged on Appeal.

See Appeal and Error, 18.

An Objection to Jurisdiction may be Raised on Appeal.

See Appeal and Error, 5.

Inferior Courts Defined, and Held Proceedings must Show Jurisdiction.

See Courts, 1, 2.

Not Having Jurisdiction of Subject Matter, Court cannot Consider Any Other Question.

See Courts, 3.

Jurisdiction Determined by Allegations in Complaint.

See Courts, 5, 6, 7.

Jurisdiction of Courts are Defined by Organic and Statutory Laws.

See Courts, 4.

Statute, Attempting to Confer Exclusive Jurisdiction on County Court for Admeasurement of Dower Irrespective of Dispute, Ineffective.

See Dower, 1.

JURY.

Jury—Provision of Constitution, Forbidding New Trial, not Applicable to Criminal Case.

1. Article VII, Section 3, of the Constitution, as amended (see Laws 1911, p. 7), declaring that in actions at law where the value in controversy shall exceed \$20, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court unless the court can say there is no evidence to support the verdict, does not apply to a criminal case, but the pre-existing procedure should be followed pursuant to Section 2. (State v. Evans, 214.)

Jury — Opinion from Reading Newspapers not Necessarily a Disqualification.

2. Whether an opinion has been formed from reading the newspapers which it will take evidence to remove is not a conclusive test of the qualification of a juror, the test under Section 123, Or. L., being whether he is in such a frame of mind as to enter on the trial prepared to form an impartial judgment from what he hears on the trial. (State v. Steidel, 681.)

KNOWLEDGE.

Indispensable to Assumption of Risk.

See Master and Servant, 3, 4.

LANDLORD AND TENANT.

Landlord and Tenant—Covenant of Quiet Enjoyment Implied.

1. In all leases of real property, there is an implied covenant that the lessor will protect the lessee in the quiet enjoyment of the premises for the term of the lease. (Obermeier v. Mattison, 195.)

Landlord and Tenant—Covenant of Quiet Enjoyment Protects Lessee from Exclusion from Possession.

2. An express or implied covenant of quiet enjoyment protects the lessee against exclusion from possession by one having a paramount title or by lessor himself. (Obermeier v. Mattison, 195.)

Landlord and Tenant—Lessor Required to Place Lessee in Possession.

3. A lease of real property and covenant of quiet enjoyment involves the obligation on the part of the lessor to place the lessee in possession at the time fixed for the commencement of the term. (Obermeier v. Mattison, 195.)

Landlord and Tenant—Whether Lessee's Settlement for Eviction was Fraudulently Induced Held for Jury.

4. In lessee's action for lessor's failure to put him in possession, in which it was claimed by lessor that lessee in consideration for

specified sum had made settlement, question of whether settlement had been induced by fraudulent misrepresentations, *held* for jury. (Obermeier v. Mattison, 195.)

Landlord and Tenant—Lessor Liable for Eviction, Though He has Transferred Reversion.

5. Lessor is liable for damages for failure to put lessee in possession, though he has sold land subject to lease to third party. (Obermeier v. Mattison, 195.)

Landlord and Tenant—Lessee's Contract With Lessor's Grantee, Stipulating Damages, not Binding on Lessor.

6. Lessee's contract with lessor's grantee, stipulating damages for termination of lease before expiration of term, was not evidence of damages recoverable against lessor for failure to put lessee in possession. (Obermeier v. Mattison, 195.)

Landlord and Tenant—"Attorn" Defined.

7. To "attorn" means to agree to become tenant to one as owner or landlord of an estate previously held of another, or to agree to recognize a new owner of a property or estate and promise payment of rent to him. (Obermeier v. Mattison, 195.)

Landlord and Tenant—Agreement Between Lessee and Purchaser from Landlord Held a Novation.

8. Where a lease was made, and, pending putting the tenant in possession, the land was sold subject to the lease, to which the tenant assented by making a new lease for the land and for \$100 released the original landlord, the seller accepting the sum as complete settlement for any delay in obtaining possession, etc., there was a novation eliminating the original landlord and seller, who assented, and by taking title subject to the lease and contracting for its modification the purchaser of the land became bound by the terms of the lease, which tenant accepted by joining in it. (Obermeier v. Mattison, 195.)

Landlord and Tenant—Agreement Between Purchaser of Land and Tenant Induced by Fraud No Obstacle to Enforcement of Original Lease by Tenant.

9. If the making of an agreement between a tenant and the purchaser from the landlord was induced by fraud perpetrated on the tenant, the instrument is void, and constitutes no obstacle to the tenant's enforcing his previous original lease from the landlord or to his recovery from the landlord, subsequent seller of the property, on his implied covenant therein to give possession. (Obermeier v. Mattison, 195.)

Landlord and Tenant—Tenant not Entitled to Destroy and also Enforce Fraudulently Procured Agreement of Attornment.

10. Where land was leased, and sold by the landlord subsequently, and the purchaser by fraud on the tenant induced him to make an agreement of attornment releasing his rights against the landlord, the mere signing of the agreement caused the tenant no damages, and all the tenant can claim as against the purchaser is

to be relieved from the contract, not being able to destroy it and enforce it also. (*Obermeier v. Mattison*, 195.)

Landlord and Tenant—Tenant cannot Harvest Crops Sown Which cannot Mature Before Fixed Termination of Lease.

11. When the termination of a farm lease is specified to occur at a certain date, the tenant who sows a crop which cannot mature and be harvested before the termination of the lease plants at his peril, notwithstanding Section 2546, Or. L. (*Hostetler v. Eccles*, 355.)

Landlord and Tenant—Lessee Entitled to Harvest Crop Sown Prior to Uncertain Termination of Lease.

12. Where farm lease provided for termination of lease on lessor's sale of the property prior to expiration of the specified term, lessee, having planted crop, had the right under Section 2546, Or. L., to enter upon the land and gather the crop, since in such case the termination of the lease depended on an uncertain event. (*Hostetler v. Eccles*, 355.)

Landlord and Tenant—No Recovery for Crops Planted Prior to Termination of Lease Without Allegation That Owner Prevented Harvest Thereof.

13. Where lessee subsequent to termination of lease was entitled under Section 2546, Or. L., to enter on land and gather crops planted prior to termination, he could not recover from owner the value of seed and work in planting crops without alleging that owner prevented him from harvesting crop so planted. (*Hostetler v. Eccles*, 355.)

Landlord and Tenant—Value of Seed and Labor Held not Recoverable on Termination of Lease Without Showing Arbitration of Amount.

14. Where farm lease provided for termination of lease prior to expiration of term on lessor's conveyance of land on demand by purchaser, and provided that on demand before certain date lessee should recover for labor and seed in planting crops prior thereto, the amount to be determined by arbitration, lessee could not recover for labor and seed in planting crops prior to a demand subsequent to such date, on theory that the value of the seed and labor is to be adjusted as if the demand had been made prior to such date, without showing an effort to comply with the provision as to arbitration. (*Hostetler v. Eccles*, 355.)

Landlord and Tenant—Payment to Lessee for Termination Before Expiration of Term Held not to Preclude Harvest of Crops Previously Planted.

15. Where farm lease provided for termination on conveyance of land by lessor prior to expiration of specified term, on purchaser's demand for possession, and provided for cash payments to lessee on such termination of lease, such payment was a compensation for termination of term, and did not preclude lessee from entering on land and harvesting crops planted prior to termination under Section 2546, Or. L. (*Hostetler v. Eccles*, 355.)

That Tenant Attorned After Expiration of Term for Which Grantor Collected Rent Does not Defeat Grantee's Right to Rent.

See Covenants, 7.

A Tenant cannot Remove Fixtures After the Expiration of His Term.

See Fixtures, 9.

Tenant's Right to Removal not Abandoned Where He Continues in Possession Under New Lease.

See Fixtures, 10.

LEASE.

See Covenants, 5.

See Fixtures, 10.

See Landlord and Tenant, 11-15.

An Outstanding Lease is an Encumbrance for Which the Grantor in a Warranty Deed is Liable.

See Covenants, 1, 2.

Agent not Liable on Lease Made After Disclosure of Agency.

See Principal and Agent, 1.

LIABILITY.

See Evidence, 3.

See Pleading, 6.

LIEN.

Decree Awarding Defendant's Attorney a Lien Held Inconsistent With Allegations of Complaint.

See Judgment, 6.

LIMITATION OF ACTIONS.

Limitation of Actions—Payment on Note Held to Revive Cause of Action.

1. Under Sections 24, 25, Or. L., where payee in her will provided that maker should pay funeral expenses and that such payment should be credited as interest on note, and where maker in compliance therewith paid such expenses and amount thereof was credited upon note by and with maker's assent, the payment was sufficient to revive the cause of action on the note after expiration of period of limitations. (Marshall v. Marshall, 500.)

MANSLAUGHTER.

See Homicide, 10, 11.

Defendant Guilty of Manslaughter, Though Shot was not Necessarily Fatal.

See Homicide, 15.

MASTER AND SERVANT.

Master and Servant—Assumption of Risk Defense Under Federal Act, Except Where Safety Appliance Act is Violated.

1. Under federal Employers' Liability Act, Section 4 (U. S. Comp. Stats., § 8660), eliminating the defense of assumption of risk in cases of injury through violation of any safety appliance statute, the defense remains as at common law in other cases. (*Wintermute v. Oregon-Wash. R. & N. Co.*, 431.)

Master and Servant—"Assumption of Risk" and "Contributory Negligence" Distinct Defenses.

2. The defenses of assumption of risk and of contributory negligence are separate and distinct in legal effect, although they may rest largely on the same state of facts; assumption of risk being an implied contract condition, while contributory negligence arises from the injured employee's own tort. (*Wintermute v. Oregon-Wash. R. & N. Co.*, 431.)

Master and Servant—Knowledge Indispensable to Assumption of Risk.

3. Notice or knowledge and appreciation of danger are indispensable to a servant's assumption of risk of injury. (*Wintermute v. Oregon-Wash. R. & N. Co.*, 431.)

Master and Servant—Engineer, Knowing Location of Pits in Darkened Roundhouse, Held to Assume Risk.

4. Where a switch engineer going to the registry-stand in the roundhouse, darkened by steam when he entered, knew the location of engine pits, and undertook to pass between the pits obscured by the steam, instead of using a safe way, he assumed the risk of injury by stepping into one of them. (*Wintermute v. Oregon-Wash. R. & N. Co.*, 431.)

Master and Servant—Evidence Held Insufficient to Show Agreement to Pay Percentage of Profits for Services.

5. In an employee's action to recover a percentage of profits, claimed to constitute part of his compensation, evidence held insufficient to show that defendant agreed to pay any share of profits in addition to salary paid. (*Poyntz v. Holman Transfer Co.*, 652.)

MISTAKE.

Must Allege That Mistake was Mutual or Originated in Fraud.
See Reformation of Instruments, 1.

MONEY HAD AND RECEIVED.

See Mortgages, 1.

MORTGAGES.

Mortgages—Decision for Defendant in Foreclosure Held Conclusive Against Claim of Money had and Received by Defendant.

1. Where complaint in foreclosure suit, in addition to setting forth the power of attorney under which note and mortgage were

executed, clearly insufficient therefor, alleged, to show ratification of the agent's act in borrowing the money and executing the note and mortgage, that the money was applied to defendant's use and benefit, all of which benefits she accepted and retained, and the court found the equities to be with defendant, such decision was *res judicata* of plaintiff's claim, sought to be enforced in a subsequent suit, that defendant was liable for the money advanced on the note and mortgage as for money had and received. (United States Nat. Bank v. Shehan, 155.)

MOTION IN ARREST.

Filed Two Days After Verdict, but Before Entry of Judgment, is in Time.

See Criminal Law, 17.

MUNICIPAL CORPORATIONS.

Municipal Corporations—Statute Providing for Execution of Public Contractor's Bond Liberally Construed.

1. Section 6266, L. O. L., as amended by laws of 1913, page 59, providing for execution of contractor's bond conditioned on payment of claims for labor and material furnished public contractor, will be construed liberally. (Portland v. O'Neill, 162.)

Municipal Corporations—Statute as to Contractor's Bond Concerns Every Relation of Contractor to Work.

2. Section 6266, L. O. L., as amended by Laws of 1913, page 59, providing for execution of bond, condition of payment of claims for material and labor furnished public contractor, concerns every approximate relation of the contractor to the work which he has contracted to do; it being the labor and material supplied for the prosecution of the work which is protected, and not some obligation incurred by the contractor which does not approximate the construction contracted for. (Portland v. O'Neill, 162.)

Municipal Corporations—Claim for Rental for Equipment While not Used Held not Within Contractor's Bond.

3. Claim for rental for equipment leased to public contractor for the period of time such equipment was not used is not within the protection of the contractor's bond, executed under Section 6266, L. O. L., as amended by Laws of 1913, page 59. (Portland v. O'Neill, 162.)

MURDER.

See Homicide.

MUTUALITY.

A Promise Made by One Party Without a Corresponding Obligation by the Other Party is Void.

See Contracts, 2.

An Option to Continue Handling Contract not Void for Want of Mutuality.

See Contracts, 4.

Unilateral Contract may be Made Mutual by Performance.

See Contracts, 5.

NEGLIGENCE.

Evidence Held to Show Negligent Feeding of Cattle.

See Animals, 2.

NEWSPAPERS.

Opinion Formed from Reading Newspapers not Necessarily a Disqualification to Serve as Juror, the Test Under Section 123, Or. L., Stated.

See Jury, 2.

NEW TRIAL.

Order Denying New Trial Only Reviewable on Appeal from Judgment.

See Criminal Law, 32.

Denial of Motion for New Trial, Based on Insufficiency of Evidence, not Assignable as Error.

See Criminal Law, 33.

Denial of Motion for New Trial on Ground of Newly Discovered Evidence may be Assigned as Error.

See Criminal Law, 35.

Denial of Motion for New Trial for Newly Discovered Evidence, Disturbed Only Where There is an Abuse of Discretion.

See Criminal Law, 36.

NOTICE.

Indispensable to Assumption of Risk.

See Master and Servant, 3, 4.

NOVATION.

A Contract Between Lessee and Purchaser from Landlord Held a Novation.

See Landlord and Tenant, 8.

OFFICERS.

Neither the County Assessor nor the Board of Equalization Act as a Court.

See Taxation, 2.

OREGON CASES.

Applied, Approved, Cited, Distinguished, Followed, and Overruled in This Volume.

See Table in Front of This Volume. .

OREGON CONSTITUTION.

Cited and Construed in This Volume.

See Table in Front of This Volume.

OREGON STATUTES.

Cited and Construed in This Volume.

See Table in Front of This Volume.

PAROL EVIDENCE.

See Evidence, 7, 8, 11, 13.

PARTNERSHIP.

Partnership—Managing Partner may Bind Firm by Chattel Mortgage in Own Name.

1. Where a partnership had not adopted a firm name, the managing partner, who had authority to transact the business for the firm, could execute a chattel mortgage of the firm property to secure a firm debt in any name he chose to adopt, including his individual name, and such mortgage would bind the other partner. (Aramburn v. Guerricagotia, 258.)

Partnership—Chattel Mortgage in Name of One Partner Held Obligation of Firm.

2. A chattel mortgage of firm property, signed by only one member of the firm in his individual name, is an obligation of the firm, where that partner had theretofore transacted the business of the firm, including the banking of its money, in his own name, and the mortgage was given to renew the lien of a previous mortgage of the same property, which was signed by both partners. (Aramburn v. Guerricagotia, 258.)

Partnership—Facts Held not to Show Conspiracy by Mortgagee and Partner to Defraud Other Partner.

3. In suits to foreclose a chattel mortgage of firm property and for an accounting between the partners, the fact that the partner who signed the mortgage for the firm defaulted in the foreclosure suit and retained the attorney for the mortgagee to represent him in the accounting suit does not justify the conclusion that the mortgagee and the partner were working together to defraud the other partner. (Aramburn v. Guerricagotia, 259.)

PAYMENT.

See Eminent Domain, 2-5.

Recital of Payment may be Contradicted or Varied by Parol.

See Evidence, 9.

Evidence of, Insufficient to Rebut a Presumption of Ownership from Possession.

See Executors and Administrators, 1.

Payment on Note Held to Revive Cause of Action.

See Limitation of Actions, 1.

PEACEABLENESS.

See Homicide, 18, 19.

PERSONAL INDIGNITIES.

Rendering Life Burdensome.

See Divorce, 10.

PERSONAL INJURIES.

Federal Liability Act Exclusive as to Injuries from Handling Interstate Commerce.

See Commerce, 1.

PLEADING.

Pleading—Every Reasonable Inference Invoked to Support Complaint, not Objected to Below.

1. When a complaint reaches the Supreme Court without having been demurred to or moved against in any way, every reasonable inference or intendment should be invoked to support it. (*Dippold v. Cathlamet Timber Co.*, 183.)

Pleading—Verdict Never Supplies Material Averment.

2. While it is true that a verdict aids an informal statement of facts in a pleading, it will never supply a material averment that goes to the gist of the action. (*Dippold v. Cathlamet Timber Co.*, 183.)

Pleading—Complaint After Verdict Held to Plead Fraudulent Misrepresentations.

3. In lessee's action for lessor's failure to put him in possession, in which it was claimed by lessor that lessee in consideration for specified sum had made settlement, allegations that lessee had been induced to make settlement by agreement that it should cover claims only to date of settlement, and by false statements that the premises were unoccupied, *held*, in absence of demurrer and after verdict, to plead fraudulent misrepresentations. (*Obermeier v. Mattison*, 195.)

Pleading—Facts Stated in Complaint Assumed True on Motion to Elect.

4. For the purpose of considering defendant's motion to compel plaintiff to elect upon which of his alleged causes of action he will rely, the facts stated in the complaint are assumed to be true. (*Johnson v. Homestead-Iron Dyke Mines Co.*, 318.)

Pleading—Election not Compellable Unless Duplicate Recovery Possible.

5. Plaintiff will not be required to elect upon which of his alleged causes of action he will rely where, under the complaint,

there cannot be duplicate recovery for the same cause of action. (Johnson v. Homestead-Iron Dykes Mines Co., 318.)

Pleading—Conclusions of Pleader cannot Vary Liability of One Executing Note.

6. Where a note with the addition of defendant's name on the back was set forth in the complaint, defendant's liability is fixed by the instrument, which controls conclusions of the pleader as to liability. (First Nat. Bank v. Bach, 332.)

Pleading—Deed—Statement of Legal Effect—Copy as an Exhibit in Haec Verba.

7. Where an executed deed is pleaded by plaintiff according to the legal effect which he puts upon it, and is also set out in *haec verba* as an exhibit attached to and made part of his final pleading, the deed itself prevails to the exclusion of a statement of its legal effect in the pleading. (O'Neil v. Twohy Bros. Co., 481.)

Pleading—Construed Against Pleader on Demurrer.

8. Pleadings, when tested by demurrer, must be construed most strongly against the pleader. (Marshall v. Marshall, 500.)

Pleading—Demurrer Admits Truth of Facts Well Pleased.

9. Demurrer admits the truth of what is well pleaded and of every reasonable and proper inference deducible therefrom. (Marshall v. Marshall, 500.)

Pleading—Complaint Sufficient to Sustain Judgment After Verdict.

10. A complaint which was not specific was broad enough after verdict to sustain a judgment, where the defendant met the issue and affirmatively pleaded his rights in the matter and admitted necessary facts. (Winn v. Taylor, 556.)

Pleading—Omission of Essential Allegation cannot be Aided by Verdict.

11. If the complaint is lacking in some material or essential allegation to establish a good cause of action, there can be no aid by verdict. (Winn v. Taylor, 556.)

Pleading—Conclusions of Law cannot be Substituted for Statements of Fact.

12. Conclusions of law cannot be substituted for a statement of facts constituting the plaintiff's cause of action, but a statement of fact may be such that it cannot be made without including a conclusion. (Winn v. Taylor, 556.)

Pleading—Defective Complaint Which Did not Omit Material Averment Held Cured by Verdict.

13. Where the complaint, after rejecting conclusions of law, did not omit any material allegation, its defects are cured by the verdict which established every reasonable inference that can be drawn therefrom. (Winn v. Taylor, 556.)

See Contracts, 1.

See Mortgages, 1.

Defect in Complaint Waived, Where not Challenged Below by Demurrer.

See Appeal and Error, 1.

Court Properly Permitted Filing of Reply at Time of Trial.

See Appeal and Error, 17.

One Suing on Contract must Show by Complaint Performance or Waiver of Conditions.

See Contracts, 9.

Jurisdiction is Determined by Allegations Made in Complaint.

See Courts, 5.

Complaint for Damages to Building Out of State, Held not to Show Jurisdiction in Court.

See Courts, 6.

Complaint Held to State Capacity to Sue as Executor.

See Executors and Administrators, 2.

Necessary Averments Stated in Alleging Fraud.

See Fraud, 1.

Must Allege That Mistake was Mutual or Originated in Fraud.

See Reformation of Instruments, 1.

PLEDGE.

Pledge of Corporate Stock Does not Deprive Pledgor of All Property Rights.

See Corporations, 3.

Notice of Rescission of Contract to Purchase Corporate Stock Necessary, Even Though Pledged to Secure Purchase-money Note.

See Corporations, 4.

POLICE POWER.

Final Determination of Limits of Police Power is for Courts.

See Constitutional Law, 6.

Legislature has Large Discretion Under Police Power.

See Constitutional Law, 7.

POSSESSION.

See Bills and Notes, 1.

See Executors and Administrators, 1.

See Landlord and Tenant, 1-10.

PRESUMPTION.

No Presumption That Wife Consented to Revelation of Her Privileged Communications.

See Appeal and Error, 20.

Presumption of Ownership from Possession.

See Bills and Notes, 1.

Statutes are Presumed Valid.

See Constitutional Law, 8.

Bad Faith of Prosecuting Officer in Asking Impeaching Question not Presumed.

See Criminal Law, 19.

That Clerk Issuing Execution Did so Regularly.

See Evidence, 14.

Evidence of Payment Insufficient to Rebut a Presumption of Ownership from Possession.

• See Executors and Administrators, 1.

PRINCIPAL AND AGENT.**Principal and Agent—Agent not Liable on Lease Made After Disclosure of Agency.**

1. Agent who leases land, disclosing to lessee that he is acting as agent, is not liable to lessee for failure to put lessee in possession. (*Obermeier v. Mattison*. 195.)

Principal and Agent—Burden of Proving Agency in Satisfaction of a Mortgage Held on Mortgagor.

2. In action to foreclose a chattel mortgage of crops, defended on ground that mortgage had been satisfied by mortgagor's conveyance of the land on which the crops had been grown to mortgagee by delivery of blank deed to mortgagee's alleged agent, who inserted mortgagee's name as grantee therein, mortgagor had burden of proving that alleged agent in accepting deed and inserting mortgagee's name therein was acting for and as agent of the mortgagee, or that his acts were ratified and approved by mortgagee. (*Wilson v. North Powder Milling Co.*, 364.)

Agency Held Sufficiently Shown to Admit Conversation With Principal.

See Evidence, 1.

Evidence Held not to Prove Agency to Accept Deed in Satisfaction of Crop Mortgage.

See Deeds, 1.

PRINCIPAL AND SURETY.**Surety on Appeal must Appear Before Judge or Clerk to Justify.**

See Appeal and Error, 9.

PRIVILEGED COMMUNICATIONS.

See Appeal and Error, 20.

See Witnesses, 6, 7.

PROFIT AND LOSS.

Lost Profits must be Proven by Definite Data.

See Damages, 1.

PUBLIC IMPROVEMENTS.

See Municipal Corporations, 1-3.

PUBLIC LANDS.

Public Lands—Railroad Liable for Price Per Acre Paid to United States to "Confirm" Title.

1. In view of the Innocent Purchasers' Act (Act Cong. Aug. 20, 1912), plaintiffs, who, in good faith purchased land from a railroad company in violation of the grant of the land to the road from the United States, providing it should be sold only to actual settlers, in quantities of not more than quarter-sections, for not more than \$2.50 an acre, *held* entitled to recover from the railroad whose title was defeated by the United States the amount of \$2.50 an acre paid by them to the United States to perfect or "confirm" their title, which means to make firm or firmer, to establish or strengthen, to ratify, etc. (Hammond v. Oregon & California R. Co., 1.)

Public Lands—Railroad Liable for Price Per Acre Paid to United States to Perfect Title—"Void."

2. In view of the Chamberlain-Ferris Act of June 9, 1916, a lumber company, which in good faith purchased some 19,000 acres of land from a railroad company, in violation of the grant of the land to the road from the United States, providing that it should be sold only to actual settlers in quantities not greater than quarter-sections, and for not more than \$2.50 an acre, *held* entitled to recover from the railroad, whose title was defeated by the United States, the amount of \$2.50 an acre paid by it to the United States to perfect its title, but not the total illegal price paid by it to the road, the contract between it and the road not having been "void"; that is, a mere nullity. (Booth-Kelly Lumber Co. v. Oregon & Cal. R. Co., 21.)

QUESTION FOR JURY.

Whether Delay was Caused by "Unavoidable Accident," and Therefore Excusable, Held for Jury.

See Contracts, 8.

Guilt or Innocence of Defendant is Exclusively for the Jury.

See Criminal Law, 9.

Question on Which Evidence is Conflicting is for the Jury.

See Criminal Law, 10.

Whether Defendant had Fired Shot, or Been Mere Bystander, is a Question for the Jury.

See Homicide, 14.

Evidence Held to Make Self-defense a Question for the Jury.

See Homicide, 16.

Whether Lessee's Settlement for Eviction was Fraudulently Induced, Held for the Jury.

See Landlord and Tenant, 4.

QUIETING TITLE.**Quieting Title—"Cloud on Title" Defined.**

1. A "cloud upon title" may be defined substantially as an estate in or encumbrance upon real property which is apparently valid but in fact without foundation. (Crim v. Thompson, 599.)

Quieting Title—Valid Judgment and Sale Thereunder not a Cloud on Title.

2. Where defendant, who was acting as attorney for plaintiff in former litigation when a judgment was rendered against her, subsequently purchased land sold under execution issued on such judgment, such facts did not constitute a cloud on title in absence of any showing of invalidity in the judgment. (Crim v. Thompson, 599.)

REAL ESTATE.**A Building is not a Part of Realty, if Agreed It may be Removed.**

See Fixtures, 1.

REASONABLE DOUBT.

See Criminal Law, 8.

See Homicide, 9.

RECAPTION.

See Corporations, 5.

RECEIVERS.**Receivers—Order for Receiver Takes Effect from Date of Filing, not of Signature.**

1. Where the application for receiver was presented, and the order signed before the complaint was filed, and the clerk corrected the discrepancy between the dates, the proceeding was not thereby rendered void, since the order took effect from date of its filing, not of signature. (Giroux v. Bockler, 398.)

Receivers—Defendant's Inability to Handle Business Sufficient Cause.

2. Where defendant bought a company doing a mercantile business, and failed to perform his part of the contract, the fact that defendant was not capable of handling so large a business successfully, and its management must result in bankruptcy for himself and the company, justifies the appointment of a receiver at seller's instance. (Giroux v. Bockler, 398.)

REDIRECT EXAMINATION.

Of Character Witnesses as to Defendant's Violations of Law Held Proper.

See Witnesses, 4.

REFORMATION OF INSTRUMENTS.

Reformation of Instruments—Complaint must Allege That Mistake was Mutual or Originated in Fraud.

1. A complaint, in a suit for the reformation of a written instrument, must allege that the mistake was mutual, and did not arise from plaintiff's own gross negligence, or that his misconception originated in the fraud of defendant. (Rosenberg Suit & Coat Co. v. General Accident Fire Assur. Corp., 118.)

Reformation of Instruments—Equity Alone can Reform Attornment Agreement to Restrict Release of Original Landlord.

2. If a tenant would reform his attornment agreement with the purchaser of the land so as to restrict his release of the original landlord to the damages accruing from failure to give possession and enforce it where reformed, he must seek the equity forum. (Obermeier v. Mattison, 195.)

RENT.

See Covenants, 2, 4, 5, 7.

REPUTATION.

Defendant's Reputation Confined to Trait Involved in Offense Charged.

See Criminal Law, 13.

RESCISSION.

Buyer of Stock in Corporation Held Entitled Either to Rescind or Counterclaim for Damages.

See Corporations, 2.

Necessity of Notice of Rescission of Contract to Purchase Corporate Stock.

See Corporations, 4.

RES GESTAE.

A Conversation Five Days Before Killing not Admissible as Res Gestae.

See Criminal Law, 5.

ROBBERY.

Robbery—Evidence of Defendant's Protestation of Innocence Inadmissible as Showing Identification.

1. While, under Section 727, L. O. L., declaring that evidence may be given of a declaration or act of another in the presence and within the observation of a party, and his conduct in relation thereto, the state might introduce evidence of defendant's strong protestation of innocence when the prosecuting witness identified

him as a robber, it would clearly be immaterial to introduce it as showing identification of defendant by the prosecuting witness. (State v. Evans, 214.)

SELF-DEFENSE.

See Assault and Battery, 2, 3.

See Criminal Law, 1-16.

See Homicide, 1-19.

SELF-SERVING DECLARATION.

See Criminal Law, 28.

SPECIFIC PERFORMANCE.

Specific Performance—Evidence Held not to Show Performance of Condition of Contract to Convey.

1. Where one defendant in suit for partition asked specific performance, claiming interests in the property by virtue of a contract with some of his co-owners, whereby they were to convey their interests to him on condition that he support their mother during her lifetime, evidence held insufficient to show performance of that condition. (Lexington Inv. Co. v. Watson, 379.)

Specific Performance—May be Granted in Favor of Party Who Did not Sign Contract.

2. Specific performance may be granted in favor of a party who did not sign the contract as against other parties who did sign it. (Lexington Inv. Co. v. Watson, 379.)

Specific Performance—Contract not Signed by All Owners not Enforced.

3. Where the written contract showed on its face that it was the intention of the parties that it should not become effective until it was signed by all ten heirs of the former owner of the land, it will not be specifically enforced as against the six heirs who did sign it, especially after the lapse of 20 years during which the parties treated it as not in force. (Lexington Inv. Co. v. Watson, 379.)

Specific Performance—Evidence Held to Show Inventory of Stock in Store Properly Taken.

4. In a suit for specific performance of a contract for sale of a store, the preponderance of the testimony held to show that a substantially correct inventory was taken, after a few minor changes acquiesced in by the defendant, so that he cannot make failure to furnish an inventory an excuse for refusal to execute notes and make payments stipulated in contract. (Giroux v. Bockler, 398.)

Specific Performance—Evidence Held not to Sustain Defendant Buyer's Claim of Fraudulent Representation of Volume of Business.

5. In an action for specific performance of a contract selling a mercantile business, preponderance of the evidence held not to sustain defendant's claim of false representation as to the volume of business done. (Giroux v. Bockler, 398.)

Specific Performance—Sale and Distribution by Receiver Held Proper Remedy for Performance of Contract Selling Mercantile Business.

6. Where buyer of a corporation and its mercantile business assumed charge and subsequently refused to execute notes for payments stipulated, and seller brought suit for specific performance, and a receiver was appointed, a direction for sale of the property by the receiver to the highest bidder, proceeds to be used to pay expenses under receivership sale, unpaid bills contracted by defendant for goods, balance due to plaintiffs, less one half of receivership expenses due and transfer of the capital stock and remainder to the defendant as his share of the proceeds, *held* the proper remedy. (Giroux v. Bockler, 398.)

STATES.

States—Prohibition of Sale of Fish Caught in Closed Season Held Not to Violate Agreement With Other State.

1. The agreement between the States of Oregon and Washington, embodied in Laws of 1915, page 233, Section 20, made with the consent of Congress, that neither would, without the consent of the other, enact any law which would conflict with the terms of the compact, which compact was limited to laws and regulations which would affect their concurrent jurisdiction over streams, is not violated by Laws of 1919, page 653, Section 5, prohibiting within the state the sale or possession of fish caught beyond the three-mile line outside the Columbia River during the periods fixed by both states as the closed season for that river. (Union Fishermen's Co. v. Shoemaker, 659.)

STATUTES.

Statutes—Legislative Intent Controls Construction.

1. The legislative intent always controls construction. (State v. Stevenson, 285.)

Statutes—Construed to Give Effect to Every Clause, if Possible.

2. The courts are required to construe a statute so as to give effect to every clause thereof, if possible. (Union Fishermen's Co. v. Shoemaker, 659.)

Statutes—Construed to Ascertain Intention of Legislature.

3. In construing a statute, the intention of the legislature is to be sought, and, if the words are not sufficient to manifest such intention, it is to be ascertained by considering the context, subject matter, the necessity for the law, the circumstances of its enactment, the mischief to be remedied, and the object to be attained. (Union Fishermen's Co. v. Shoemaker, 659.)

Statutes—If Intent not Ascertainable, Reasonable Construction Adopted.

4. If the intention of the legislature in enacting a statute cannot be ascertained, the courts should give the statute a reasonable construction consistent with the general principles of law. (Union Fishermen's Co. v. Shoemaker, 659.)

Statutes—Regulating Fishing in Particular Stream not Discriminatory.

5. Laws of 1919, page 653, Section 5, is not invalid as discriminatory, and not of general application because it prohibits the sale and possession of fish caught between certain dates only when they are caught within or outside the mouth of the Columbia River. (Union Fishermen's Co. v. Shoemaker, 659.)

See Appeal and Error, 14.

See Municipal Corporations, 1-3.

Inconsistent With Amendment is Void.

See Constitutional Law, 3.

Statutes are Presumed Valid.

See Constitutional Law, 8.

Statute for Election on Bond Issue Repealed by Constitutional Amendment Only as to Limit of Indebtedness.

See Counties, 2.

Construction of Statute by Circuit Courts do not Bind Supreme Courts.

See Courts, 8.

Giving Successful Party One Third of Other's Property is Imperative.

See Divorce, 8.

Giving Interest in Property Does not Apply to Land Outside State.

See Divorce, 9.

Attempting to Confer Exclusive Jurisdiction on County Court for Admeasurement of Dower Irrespective of Dispute, Ineffective.

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Statute Held to Privilege All Communications, not Merely Confidential Ones.

See Witnesses, 7.

STIPULATIONS.

Cognizance of Appellate Court not Taken of Oral Stipulations Made Out of Court.

See Appeal and Error, 9.

STOCK.

Pledge of Corporate Stock Does not Deprive Pledgor of All Property Rights.

See Corporations, 3.

Recaption of Stock Held not Exclusive Remedy of Seller.

See Corporations, 5.

TAXATION.

Taxation—No Appeal from Decree Setting Aside Assessment, Proceeding Being Summary.

1. No appeal lies from a decree of the Circuit Court setting aside an assessment in a proceeding brought under Section 3613, L. O. L., such statute providing a special proceeding, summary and complete within itself. (Smith Security Co. v. Multnomah County, 418.)

Taxation—Neither the County Assessor nor the County Board of Equalization Act as a Court.

2. A county assessor is not a court, and in lowering or raising valuations on property a county board of equalization is not acting or sitting as a court. (Smith Security Co. v. Multnomah County, 418.)

Taxation—No Appeal from Decree of Circuit Court Setting Aside Assessment on Appeal from County Board of Equalization.

3. Where, on appeal to the Circuit Court, pursuant to Section 4299, Or. L., from the county board of equalization, which denied petition to have an assessment reviewed and corrected, the Circuit Court set aside the original assessment and reduced the valuation, no appeal on behalf of the county lies from such decree of the Circuit Court to the Supreme Court under Sections 548 and 549. (Smith Security Co. v. Multnomah County, 418.)

TIME.

Time—Computing Time for Notice of Appeal by Excluding First Day.

1. Where judgment was entered March 13th, the 60-day period within which the notice of appeal is required to be served and filed under Section 550, L. O. L., as amended by Laws of 1913, page 617, will be computed, under Section 531, L. O. L., requiring first day to be excluded in computing time within which an act is to be done, by excluding both the 13th and the 14th of March. (Nealan v. Ring, 490.)

TITLE.

Railroad Liable for Price Per Acre Paid to United States to "Confirm" Title.

See Public Lands, 1, 2.

TRANSCRIPT OF EVIDENCE.

Effect of Failure to have Same Properly Authenticated.

See Appeal and Error, 21-24.

TRESPASS.

Trespass—Authority of Irrigation District Giving Contractor Right to Interrupt Flow is a Defense.

1. In an action against a contractor for interference with the flow of water to plaintiff's land through an irrigation ditch, the

authority of irrigation district, giving contractor the right to interrupt the flow, is a defense, if the title of the district to the ditch was superior to that of the land owner. (*Marks v. Twohy Bros. Co.*, 514.)

Killing of Animals to Prevent Trespass Does not Prove Wanton or Malicious Killing.

See Animals, 1.

Comparative Injury not Considered in Case of Continuing Trespass.

See Injunction, 1.

TRIAL.

Trial—Findings must be Responsive to Issues.

1. Findings of trial court must be responsive to the issues, and, if not responsive thereto are nullities, and will not support the judgment, since such findings will not supply necessary allegations required in the pleadings. (*Portland v. O'Neill*, 162.)

Trial—Jury Trial Waived Where Both Parties Moved for Directed Verdict.

2. Where each party moved for a directed verdict, the right to trial by jury was waived, and the question was submitted to the court as a matter of law whether verdict should be directed for plaintiff or defendant. (*First Nat. Bank v. Bach*, 332.)

Trial—Requested Instructions to be Tested by Words Used, not by Words Meant to be Used.

3. In action for alienation of affections, requested instruction that "evidence of statements of wife of the injured spouse were received in this case and admitted in evidence for the purpose only of showing the feelings of the injured spouse," and not to establish the facts stated, held properly refused, declarations of the wife being inadmissible to prove the husband's feelings, although it may be assumed it was intended by the framer of the instruction to so word it as to advise the jury that the wife's declarations could only be considered as evidence of her feelings; yet the instruction must be tested by the words found in it. (*Pugsley v. Smyth*, 448.)

Trial—Refusal of Instructions Covered by Others not Error.

4. It is not reversible error to refuse requested instructions which are accurate and concise statements of the law applicable, where such matters are substantially covered by other instructions. (*Pugsley v. Smyth*, 448.)

Theory of Trial must be Adhered to.

See Appeal and Error, 28.

Theory Determined from Entire Record and Brief.

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TROVER AND CONVERSION.

Evidence Held not to Show Conversion of Client's Funds.

See Attorney and Client, 1.

Grantee Conveying to Third Party Without Excepting Elevator to Which Grantor had Retained Title, Liable to Grantor for Conversion.

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Appellant Permitted to File Additional Undertaking After Dismissal of Appeal, on Showing Serious Illness of Counsel.

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Where Variance Between Complaint and Proof Held Immaterial, as not Misleading.

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VENDOR AND PURCHASER.

Vendor and Purchaser—Burden of Proving Fraud by Vendor Rests on Purchaser.

1. In a suit to foreclose a purchase-money mortgage, where defendant alleged fraud in the sale of the property to him, and asked for rescission of the contract, the burden of proving the fraud rested on defendant. (*White v. Harrison*, 508.)

Vendor and Purchaser—Evidence Held not to Establish Fraud by Vendor.

2. In suit to foreclose a purchase-money mortgage, where defendant sought rescission of the contract because of fraudulent representations, where defendant's testimony of the fraud was uncorroborated, while plaintiff's denial was corroborated by other witnesses, and defendant admitted he had an opportunity to examine the land, evidence held insufficient to establish the fraud. (*White v. Harrison*, 508.)

Vendor and Purchaser—"Warranty Deed" Implies Usual Covenants of Warranty.

3. The term "warranty deed" in a contract of sale has a well-understood meaning as a deed containing the usual covenants generally inserted in a warranty deed, including the covenants that the land is free and clear from encumbrances. (*Winn v. Taylor*, 556.)

VERDICT.

Under the Constitution, a Verdict Supported by Some Evidence is not Reviewable.

See Appeal and Error, 15.

Held to have Been Based on Insufficient Cause of Action.

See Appeal and Error, 26.

Motion in Arrest, Filed Two Days After Verdict, but Before Entry of Judgment, is in Time.

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A Verdict Never Supplies Material Averment.

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Complaint After Verdict Held to Plead Fraudulent Misrepresentations.

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A Complaint not Specific was Broad Enough After Verdict to Sustain Judgment.

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Defective Complaint Which Did not Omit Material Averment, Held Oured by Verdict.

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Owner may Alienate the Ditch and Retain the Water.

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WAIVER.

Defect in Complaint Waived Where not Challenged Below by Demurrer.

See Appeal and Error, 1.

Transfer of Property Decreed to Party by Court, Waived Right of Appeal.

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Complaint must Show Waiver of Conditions in Contract by Defendant or Performance on Part of Plaintiff.

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Strict Compliance With Contract Waived by Buyer so That One of the Sellers was Entitled to Maintain Separate Action.

See Corporations, 1.

Jury Trial Waived Where Both Parties Moved for a Directed Verdict.

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WATERS.

Waters—Watercourse may not be Obstructed by Land Owner Where Entering His Land to Injury of Upper Proprietor.

1. A stream flowing through plaintiff's land into that of defendant, if constituting a watercourse within the meaning of the common law, may not be obstructed by defendant at its entrance into his land, unless he provides some equally convenient method for draining plaintiff's land. (Hansen v. Crouch, 141.)

Waters—Stream Arising from Seepage or Collected in Channel Held a "Watercourse."

2. A stream existing from time immemorial, made by flow of waters arising from seepage from the hills or collected in one channel by the general slope of the surrounding country, having well-defined banks through which water is accustomed to flow, serving the useful purpose of carrying away water that would otherwise accumulate on the lands, and having a flow, though not continuous, fairly regular, and not the offspring of sudden and unusual freshets, is a "watercourse" within the common law. (Hansen v. Crouch, 141.)

Waters—Land Owner may Change Course of Stream if not Injuring Others.

3. Where a watercourse draining plaintiff's land enters that of defendant, he may drain it by a ditch on his land; plaintiff's only right being that its flow shall not be arrested, so as to turn it back on her land. (Hansen v. Crouch, 141.)

Waters—Irrigation—Vested Rights—Owner may Alienate the Ditch and Retain the Water.

4. The owner of a vested right for the irrigation of semi-arid agricultural lands by means of water from a creek drawn through a ditch may retain his water rights and alienate the ditch, the means by which he enjoyed such right, notwithstanding it is the only present means of employing the water rights. (O'Neil v. Twohy Bros. Co., 481.)

Waters—Irrigation—Owner Conveying Ditch—Damages for Its Destruction.

5. Where the owner of semi-arid agricultural lands, producing crops when irrigated, had a vested water right in the waters of a creek through a certain ditch, and by deed conveyed his interest in the ditch to an irrigation district, without reservation, he could not thereafter complain of its destruction by the district's contractor or recover damages of the contractor. (O'Neil v. Twohy Bros. Co., 481.)

Waters—Ditch can be Conveyed Separate from Waters Carried Therein.

6. The owners of a ditch may convey the ditch to another, separate from their right to the water for the irrigation of their lands which had been previously carried in the ditch. (Marks v. Twohy Bros. Co., 514.)

Waters—Reservation of Water Right from Ditch Conveyance Held not to Include Right to Carriage of Waters.

7. Where the owners of an irrigation ditch conveyed it to an irrigation district to enable the latter to construct its canal along the line of the ditch, which necessitated destruction of the ditch, a reservation of the water right of grantors did not carry with it the right to use the ditch to convey the reserved water to the lands of grantors. (*Marks v. Twohy Bros. Co.*, 514.)

Waters—Irrigation District Contract Held not to Prevent Destruction of Existing Ditch.

8. A provision in an irrigation district contract, requiring the contractor to protect from injury existing property except in so far as the work required its modification or removal, does not require the contractor to protect the rights of the former owners of a ditch to convey water for irrigation of their lands through the ditch, where they conveyed the ditch to the district for the purpose of enabling the district to construct its canal along the line of the ditch. (*Slayton v. Twohy Bros. Co.*, 535.)

Authority of Irrigation District Giving a Contractor the Right to Interrupt the Flow is a Defense.

See Trespass, 1.

WITNESSES.

Witnesses—Impeachment must be According to Statutory Method.

1. Under Sections 863, 864, L. O. L., a party to impeach the testimony of an adverse witness, must pursue the statutory method. (*State v. Holbrook*, 43.)

Witnesses—Inconsistent Statements, Used for Impeachment, must Relate to Testimony of the Witness.

2. Before a witness can be impeached, under Section 864, L. O. L., there must appear in his evidence something inconsistent with the statement said to have been made by him at some other time and place, and he cannot be impeached on some utterance not thus relating to his testimony. (*State v. Holbrook*, 43.)

Witnesses—Cross-examination may Show Hostility of Witness.

3. Under Section 704, L. O. L., it is competent on cross-examination to ascertain the mental attitude of a witness toward the defendant, whether of enmity, hostility or prejudice, and he may be asked if, at other times, specifying time, place and persons present, and the particular language used, he has not made statements indicative of hostility towards the party against whom he has been called as a witness. (*State v. Holbrook*, 43.)

Witnesses—Redirect Examination of Character Witnesses as to Defendant's Violation of Law Held Proper.

4. In homicide prosecution, where witnesses for state had testified as to the bad reputation of one of the defendants, and on cross-examination had admitted that the basis of their estimate of his reputation was some trouble he had had, redirect examination by state, eliciting that the trouble referred to involved a

violation of law, *held* proper, having been brought on by defendants' cross-examination. (State v. Holbrook, 43.)

Witnesses—Cross-examination as to Defendant Being Charged With Theft Held Proper.

5. In homicide prosecution, where character witness for defendant had testified on direct examination that defendant's reputation was that of a law-abiding citizen, cross-examination as to defendant having been charged with theft *held* proper. (State v. Holbrook, 43.)

Witnesses—Wife's Admission of Adultery Made to Husband is Privileged.

6. In an action for alienating affections of plaintiff's wife, her communications to plaintiff admitting adultery with defendant were shielded by Section 733, subdivision 1, Or. L., relating to privileged communications between spouses. (Pugsley v. Smyth, 448.)

Witnesses—Statute Held to Privilege All Communications, not Merely Confidential Ones—"Any Communications."

7. In Section 733, subdivision 1, Or. L., and Section 734, the words "any communications" do not mean "confidential communications," but that all communications between husband and wife are privileged unless express or implied consent to publication is given, or unless the privilege is lost by being brought within one of the specified Code exceptions, and such statutes apply to suits for alienation of affections. (Pugsley v. Smyth, 448.)

Witnesses—Impeachment Only as to Material Matters.

8. A witness can only be impeached on matters that are material to the issues. (State v. Steidel, 681.)

Distance of Witnesses from Scene Does not Make Testimony Circumstantial so as to Require Instruction Thereon.

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Ruling That Foundation for Impeachment of Witness was Insufficient, Held Harmless.

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Cross-examination of Defendant as to His Being Secretary of the Labor Socialist Party, not Reversible Error in View of His Direct Testimony.

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